

No. 12287

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United States  
Court of Appeals  
For the Ninth Circuit.

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W. L. CASEY and AGNES CASEY,  
Appellants,  
vs.

R. MAX ETTER and WILLIAM E. CULLEN,  
Appellee.

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Transcript of Record

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Upon Appeal from the United States District Court  
for the District of Idaho, Northern Division.

FILED  
AUG 31 1949

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein printing in italic the two words between which the omission seems to occur.]

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Attorneys for Plaintiffs.

W. J. NIXON,  
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Bonners Ferry, Idaho.

GEO. W. YOUNG,  
502 Paulsen Building,  
Spokane, Washington,  
Attorneys for the Defendants.

In the District Court of the United States for the  
District of Idaho, Northern Division

No. 1720

R. MAX ETTER and WILLIAM E. CULLEN,  
Plaintiffs,

vs.

W. L. CASEY and MRS. JANE DOE CASEY,  
Whose True Christian Name Is Unknown, His  
Wife,  
Defendants.

### COMPLAINT

Come now the plaintiffs and for cause of action  
allege as follows:

#### I.

The jurisdiction of this court is founded upon  
diversity of citizenship and the amount involved.

(a) The plaintiffs are citizens and residents of  
the State of Washington.

(b) The defendants are citizens and residents of  
the State of Idaho.

(c) The matters in controversy exceed \$3,000.00,  
exclusive of interest and costs.

#### II.

That the plaintiffs and each of them are and were  
at all times hereinafter mentioned attorneys at law,  
authorized and licensed to practice law before the  
Supreme Court and the inferior courts in the State  
of Washington.

## III.

That at all times hereinafter mentioned the defendants, W. L. Casey and Mrs. Jane Doe Casey, whose true Christian name is unknown, were and are husband and wife, and the obligation hereafter referred to was created in the State of Washington and is the obligation of each of the defendants and the marital community composed of the said defendants herein.

## IV.

That on or about February 13, 1948, the defendants employed the plaintiffs as attorneys-at-law to perform legal services for and on behalf of the defendants, and each of them, and the community composed of the defendants.

The plaintiffs were so employed for the purpose of collecting monies owed to the defendants by others in an amount approximating \$75,000.00; and the defendants, at that time and pursuant to said employment, agreed to pay to the plaintiffs reasonable attorneys' fees for services to be performed.

## V.

In pursuance of said contract of employment the plaintiffs did advise, consult with, and represent the defendants' interests in respect of the collection of said monies, and that under and pursuant to said employment, and at the instance and request of the defendants, and for their benefit, the plaintiffs negotiated recommended, framed and supervised certain contracts, instruments and proceedings and did analyze and recommend, advise and perform other



valuable services for and on behalf of the defendants, between February 13, 1948, and June 14, 1948, to the effect and with the result that the defendants received from the claims in controversy, and in settlement thereof, a sum of approximately \$60,000.00.

## VI.

During the course of said employment, and for the special use and benefits of the defendants, and in order to carry out the contract of employment, the plaintiffs expended and advanced the sum of \$39.14 in office expenses, long distance telephone calls and travel, and that the said sums were reasonable and necessary to the performance of said contract of employment.

## VII.

The plaintiffs, as such attorneys and counselors, spent many days of time in working both in and out of their offices at Spokane, Washington, in the performance of said contract of employment; and, solely as a result of their services, efforts and advice, the defendants received a great pecuniary value, to wit, not less than \$60,000.00, and that the services so as aforesaid rendered by the plaintiffs to the defendants at their special instance and request, were and are of the reasonable value of \$15,000.00, no part of which has been paid by the defendants to the plaintiffs, and the sum of \$39.14 for monies laid out and expended by the plaintiffs for the defendants.

## VIII.

Although the defendants have acknowledged the



services of the plaintiffs and have promised to pay to the plaintiffs a reasonable and proper sum therefor, said defendants have failed and refused to pay the same, although demand has been made therefor.

Wherefore, plaintiffs pray that the court enter judgment herein in favor of the plaintiffs and against the defendants, and each of them, and the community composed of the defendants, in the sum of Fifteen Thousand Thirty-nine Dollars and fourteen cents (\$15,039.14) and for their costs and disbursements herein incurred and expended.

/s/ WILLIAM S. HAWKINS,

/s/ R. MAX ETTER,

/s/ WILLIAM E. CULLEN,

Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 21, 1948.

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[Title of District Court and Cause.]

## MINUTES OF THE COURT

November 15, 1948

Comes now counsel for the defendants and moves the Court for permission to withdraw his Motion to Dismiss and for Security of Costs. The Court, being advised in the premises, it was so ordered.

Whereupon, the Court announced that the Motion to make more definite, and for a Bill of Particulars will be denied without prejudice, and the defendant will be given three days to answer; and that 10 o'clock a.m., on Tuesday, November 23, 1948, is fixed for the trial of this cause before a jury.

Nov. 15, 1948.

[Title of District Court and Cause.]

ANSWER

Come now W. L. Casey and Agnes Casey, and for answer to the complaint of the plaintiffs herein, admit, deny, and allege as follows:

1. Admit the allegations of Paragraph I thereof.
2. Admit the allegations of Paragraph II thereof.
3. These answering defendants have no knowledge or information on which to form a belief with respect to the allegations of Paragraph III thereof, and therefore deny the same.
4. Deny each and every allegation, matter and thing contained in Paragraph IV thereof.
5. Deny each and every allegation, matter and thing contained in Paragraph V thereof.
6. Deny each and every allegation; matter and thing contained in Paragraph VI thereof, and particularly deny that the plaintiffs expended the sum of \$39.14 or any other sum for or on behalf of or at the instance and request of defendants or in pursuance of any contract of employment between defendants and plaintiffs.
7. Deny each and every allegation, matter and thing contained in Paragraph VII thereof and particularly deny that the defendants received \$60,000.00 or any other sum as a result of any services

rendered to them by plaintiffs, or that the sum of \$15,000.00 or any other sum or value of any services was rendered to them or on their behalf or at their instance and request, or that the plaintiffs laid out or expended the sum of \$39.14 or any other sum for and on behalf of defendants or at their request.

8. Deny each and every allegation, matter and thing contained in Paragraph VIII thereof except defendants admit that they refuse to pay the demand of this complaint or any other demand made by plaintiffs arising out of any alleged contract of employment between plaintiffs and these defendants.

And as an Affirmative Defense, defendants allege that the relationship of attorney and client has never and does not now exist between the plaintiffs herein and these defendants.

Wherefore having fully answered plaintiffs' complaint, defendants pray that they take nothing thereby; that the same be dismissed, and that the defendants be given judgment for their costs and disbursements herein expended.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for the Defendants.

Duly verified.

Service acknowledged Nov. 17, 1948.

[Endorsed]: Filed Nov. 18, 1948.

[Title of District Court and Cause.]

## MINUTES OF THE COURT

November 23, 1948

This cause came on for trial before the Court and a jury, Messrs. Wm. S. Hawkins, Max Etter and Wm. Cullen appearing as counsel for the plaintiffs, and Messrs. W. J. Nixon and George W. Young appearing as counsel for the defendants, who were also present.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. F. E. Vinion, whose name was so called, was excused for cause.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

O. L. Jones	Lee Carlock
Geo. H. Sonnichsen	Geo. H. Alexander
Earl Sheffler	Abe Irish
Wm. H. Frederic	Harold V. Wilson
Theo. L. Merkel	Basil Gooby
Alice A. Runsen	Wm. Neu

The Court directed that one juror, in addition to the panel, be called to sit as an alternate juror. Thereupon, the name of F. Dan O'Connell was

drawn from the jury box, and, on being sworn and examined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiffs' cause by their counsel, Wm. Cullen, R. Max Etter, Frank H. Davis, Albert Kunholtz, Edward N. Leehan were sworn and examined as witnesses, and other evidence was introduced on the part of the plaintiffs, and here plaintiffs rest.

Comes now counsel for defendants and moves the Court for a directed verdict for defendants or in the alternative for an order of judgment of non suit. The Court being advised in the premises, denied the motion.

After admonishing the jury, the Court excused them to 10 o'clock a.m., on Wednesday, the 24th day of November, 1948, and further trial of the cause was continued to that time.

Nov. 23, 1948.

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[Title of District Court and Cause.]

## MINUTES OF THE COURT

November 24, 1948

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.



Whereupon, H. J. Adams, Sherm. Beggerstaff, C. W. King, Robert S. King, and W. L. Casey, were sworn and examined as witnesses on the part of the defendants, and here the defendants rest, and here both sides close.

Comes now counsel for defendants and renews their motion for a directed verdict for defendants or in the alternative for a judgment of non suit or dismissal. After hearing respective counsel, the Court announced that the item of \$39.14 will be eliminated and the jury instructed accordingly, otherwise the motion will be overruled.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury. The Court discharged the alternate juror, and the jury panel retired in charge of a bailiff, duly sworn, to consider of their verdict.

On the same day the jury returned into court, counsel for the respective parties being present; whereupon, the jury presented their written verdict, which was in the words following:

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[Title of Court and Cause.]

### VERDICT

“We, the Jury in the above-entitled cause, find for the plaintiffs, and assess damages against the defendants in the sum of \$ Four Thousand and no/100.

/s/ “O. L. JONES,  
“Foreman.”

The verdict was recorded in the presence of the

jury, and then read to them, and they each confirmed the same.

Nov. 24, 1948.

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[Title of District Court and Cause.]

### VERDICT

We, the Jury in the above-entitled cause, find for the plaintiffs, and assess damages against the defendants in the sum of \$ Four Thousand and no/100.

/s/ O. R. JONES,  
Foreman.

[Endorsed]: Filed Nov. 24, 1948.

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In the District Court of the United States for the  
District of Idaho, Northern Division

No. 1720

R. MAX ETTER and WILLIAM E. CULLEN,  
Plaintiffs,

vs.

W. L. CASEY, and MRS. JANE DOE CASEY,  
Whose True Christian Name Is Unknown, His  
Wife,

Defendants.

### JUDGMENT

This cause came on for trial before the Court and a jury on November 23, 1948, et seq., both parties

appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiffs in the sum of Four Thousand Dollars (\$4,000.00),

It Is Hereby Ordered, Adjudged and Decreed That plaintiffs recover of defendants the sum of \$4,000.00, with interest at the rate of 6% per annum from the date of Judgment, and their costs in the amount of \$60.88, and that plaintiffs have execution therefor.

Dated at Coeur d'Alene, Idaho, this 24th day of November, 1948.

[Seal]      /s/ ED. M. BRYAN,  
Clerk.

[Endorsed]: Filed Nov. 24, 1948.

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[Title of District Court and Cause.]

MOTION FOR JUDGMENT N.O.V. OR IN THE  
ALTERNATIVE FOR A NEW TRIAL

Come now the above-named defendants and move the Court for a judgment and/or order setting aside the judgment entered herein on the verdict of the jury, and for a judgment in conformity with defendants' motion for a directed verdict made at the conclusion of the plaintiffs' case and at the end of the taking of all testimony in this case.

In the event that the foregoing motion is denied, and in that event only, then come the defendants and represent to this Honorable Court that on the 24th day of November, 1948, a judgment was entered



herein in favor of the plaintiffs directing defendants to pay the sum of \$4,000.00 together with costs taxed herein, to the plaintiffs; that since the entry of the judgment aforesaid the defendants have discovered certain new evidence of which theretofore they had no knowledge or means of knowledge; that the said new evidence consists in proof of the following pertinent facts which would changed the result:

1. That the defendants did not contract with the plaintiffs whereby the relationship of attorney and client was to or did exist between them.

2. That the plaintiffs were employed by the Sulphur Springs Gypsum Company and certain individuals not including the defendants, to represent them with respect to claims which they had against H. J. Adams.

3. That Frank Bush, acting as the president of the Sulphur Springs Gypsum Company, requested plaintiff, Etter, to go to Billings to complete the transfer of the assets of the Sulphur Springs Gypsum Company to the new buyer and to receive from the new buyer moneys due those whom plaintiffs were representing.

4. That the letter written to Linder was secured to be done by the Sulphur Springs Gypsum Company and not by the defendants.

5. That the letter written to the Billings newspaper was written at the request of the Sulphur

Springs Gypsum Company and not by the defendants.

6. That it was orally agreed between plaintiffs and certain stockholders of the Sulphur Springs Gypsum Company that they would represent them, agree to look to H. J. Adams for their fee in the amount of \$4,000.00 but that if Adams failed to pay them their fee of \$4,000.00 they would look to the individuals employing them for their fee.

7. That by subsequent agreement the plaintiffs fixed their fee by charging and collecting from Frank Bush \$1700.00 and Kienholz \$1300.00, and the remainder of the stockholders whom they represented they fixed their fee at one half of the interest paid such stockholders, at the rate of 6% per annum on their investments.

8. That the obligation to pay attorneys fees as originally agreed, ran from Adams to the plaintiffs, with an understanding that those who contracted with Adams as disclosed in Exhibit 15 would pay in the event plaintiffs failed to collect from Adams.

That all of such facts would be testified to by Frank Bush as appears from his affidavit attached hereto.

That said motion for new trial is based upon the following further grounds:

For error of law in ruling upon relevant testimony, refusing to admit the same, which testimony would have established that the plaintiffs fixed their fee by limiting the extent thereof to an amount equal to one half of accrued interest at the rate of

six per cent per annum on claims handled by them in the same transaction.

For errors in the admission of evidence consisting of exhibits which were prejudicial to the defendants, and over their objection.

Wherefore defendants pray that the motion for judgment N.O.V. be granted, or in the alternative that their motion for new trial be granted and that they be given opportunity to present the new evidence as aforesaid.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for the Defendants.

I certified that a copy of the Foregoing Motion for Judgment N.O.V. or in the Alternative for a New Trial and attached affidavit of W. L. Casey, was mailed to W. S. Hawkins, 320 Wiggett Bldg., Coeur d'Alene, Idaho, on December 4, 1948.

/s/ GEO. W. YOUNG.

Service Acknowledged Dec. 4. 1948.

[Endorsed]: Filed Dec. 8, 1948.

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[Title of District Court and Cause.]

### AFFIDAVIT OF W. L. CASEY

W. L. Casey, being first duly sworn, upon oath deposes and says: That he is one of the parties to the above entitled action. That the above entitled case was set for trial on November 15th for trial to be had on November 23rd. That he was away

from his home in Bonners Ferry, Idaho, and was not located by his attorneys until late in the evening of November 15th. That he was away from his home, being at Spokane, Washington. That he was convalescing from sickness at the home of his sister, May Loihel at East 2937 Central Avenue in the City of Spokane. That your affiant is and was suffering from a chronic heart ailment; that he was unable to leave immediately for Bonners Ferry, where he kept his records. That he was unable to secure the whereabouts of Frank Bush, whose affidavit is attached to the motion for a new trial herein, prior to the time of trial so as to enable him to secure his testimony either by deposition or to have said witness personally in Court. That by the exercise of due diligence he could not have avoided the situation with which he is presently confronted, to-wit: that of having available the testimony of the witness Bush, whose testimony would have, in his opinion, changed the result in this case.

That H. J. Adams was not indebted to your affiant personally.

Further affiant saith not.

/s/ W. L. CASEY.

Subscribed and sworn to before me this 30th day of November, 1948.

[Seal]     /s/ GEO. W. YOUNG,  
Notary Public in and for the State of Washington,  
residing in Spokane.

Service Acknowledged Dec. 4, 1948.

[Endorsed]: Filed Dec. 8, 1948.



[Title of District Court and Cause.]

## MOTION TO STRIKE

Comes now the above named plaintiffs, through their attorneys, and move the Court for an order striking from the files herein defendants' motions for stay of execution and motion for judgment N.O.V. or in the alternative for a new trial, and to strike further from the files the affidavit of W. L. Casey set forth in support of defendants' said motion for judgment N.O.V. or in the alternative for a new trial, on the following grounds, to-wit:

(1). That the motions filed by the defendants herein are not timely and have not been filed within the ten-day period provided by the rule in such cases, to-wit, Rule 59 (b) of the Federal Rules of Civil Procedure;

(2). On the ground and for the reason that the affidavit of W. L. Casey, defendant herein, does not show that there has been an exercise by the said W. L. Casey, defendant, of due diligence and, for the further reason, that the said motion of defendants herein and the affidavit of W. L. Casey is not supported by the affidavit of any new witness that said witness will give the testimony set out in the motion or in the said affidavit of W. L. Casey (Rules of Idaho District Court, Rule #22);

(3). In the motion for judgment N.O.V. or in the alternative for a new trial and in the affidavit of W. L. Casey, reference is made to the affidavit of one Frank Bush (whose true name is Frank

Busch); that said affidavit of Frank Busch has not been filed with the Clerk of the above entitled Court; that in the absence of such an affidavit there has not been presented to this Court any affidavit of any new witness reciting or outlining the testimony of said new witness or stating that he would testify to the same in the event of a new trial; and, that, therefore, said motion wholly fails to recite any reason why a new trial should be granted;

(4). That in the affidavit of W. L. Casey he merely states:

“That he was unable to secure the whereabouts of Frank Bush, whose affidavit is attached to the motion for a new trial herein, prior to the time of trial so as to enable him to secure his testimony either by deposition or to have said witness personally in Court. That by the exercise of due diligence he could not have avoided the situation with which he is presently confronted, to-wit, that of having available the testimony of the witness, Bush, \_\_\_\_.”

But said affidavit does not set out any facts and circumstances showing the exercise of any diligence, nor does it show what effort, if any, was made by W. L. Casey to secure the testimony or deposition of the said Frank Busch;

(5). That said defendant, through his counsel, has already presented to this Court, in Chambers and in Open Court, during the progress of this trial, his objections and motions directed to the admissibility of certain evidence and exhibits, which objec-

tions have been fully and fairly presented, argued and overruled;

(6). That no offer of proof was made during the course of the trial and, therefore, no error of law was committed in refusing to admit any testimony which "would have established that the plaintiffs fixed their fees by limiting the extent thereof to an amount equal to one-half of accrued interest at the rate of six per cent per annum on claims handled by them in the same transaction," and, had such an offer been made, the same would not have been appropriate or admissible and would have been irrelevant and immaterial to the issues at hand; and,

(7). That at the time the above entitled cause was set for trial, to-wit, November 16th, 1948, no application was made for continuance upon the ground of the absence of any witness or witnesses, no application or motion was made for the vacating of the setting at that time, or at any time from then to the date of the trial, to-wit, November 23rd, 1948 and that at the time of the commencement of said trial the defendants and their proofs were ready for trial and did thereafter proceed to trial without any objections.

This Motion is based upon the records and files of this action, the minutes of the Clerk of the Court, the reporter's stenographic notes, the affidavits of R. Max Etter and William E. Cullen hereto attached, and all other matters of record herein.

Dated, this 18th day of December, 1948.

/s/ WM. S. HAWKINS,  
Attorney for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM E. CULLEN

State of Washington,  
County of Spokane—ss.

William E. Cullen, being first duly sworn, on oath deposes and says: That he is one of the parties to the above-entitled action; that after the above-entitled case was set for trial, and prior to the trial thereof, to-wit, on the 16th day of November, 1948, your affiant called Frank P. Busch's home at Colton, Washington, and was advised upon said call to get in touch with Frank P. Busch, at 4218 North Second Place, Phoenix, Arizona; that thereupon your affiant put in a long-distance telephone call to the said Frank P. Busch at the said address; that he did not actually talk to Frank P. Busch, but that Mr. Etter, another party to this action, did talk to him, at about 5:00 o'clock P.M. on Tuesday, November 16th.

That in the Motion for Judgment N.O.V. or in the Alternative for a New Trial by the defendants herein, your affiant, after examining said Motion, is informed that the Affidavit of Frank P. Busch mentioned therein is not on file in the said case; that this is presumably left out of the filings because the same was not signed; that in this connection your affiant has the following to state:

That in the evening of Wednesday, December 1, 1948, at about 7:30 o'clock P.M., the said Frank P. Busch telephoned from Phoenix, Arizona, at his own expense, to your affiant, and conversed with him



concerning the above case; that at that time the said Frank P. Busch said that W. L. Casey had forwarded an affidavit to Frank P. Busch, and that the said Frank P. Busch was not going to sign it and was going "to throw it into the waste basket"; that thereafter, and on the 7th day of December, 1948, your affiant was in his office, at 726 Paulsen Building, Spokane, Washington, when the following telegram was received, addressed to Max Etter: "Have not signed any affidavit in case of Etter and Cullen versus W. T. Casey in Federal Court in Idaho. /s/ Frank Busch."

That all during the negotiations with defendant Casey and others mentioned during this lawsuit, it was the custom of your affiant and R. Max Etter to call the said Frank P. Busch by long-distance telephone at his home in Colton, Washington; that the first time your affiant called the said Frank P. Busch, he first called the office of Mr. W. L. Casey in Spokane, Washington, and was there informed where Mr. Busch lived and was there given instructions on how to reach the said Busch by telephone; that your affiant followed said directions and that said defendant W. L. Casey has at all times prior to this said trial had the means of reaching and talking to said Frank P. Busch.

/s/ WILLIAM E. CULLEN.

Subscribed and sworn to before me this 13th day of December, 1948.

[Seal] /s/ ROY A. REDFIELD,  
Notary Public in and for the State of Washington,  
residing at Spokane therein.

[Title of District Court and Cause.]

AFFIDAVIT OF R. MAX ETTER

State of Washington,  
County of Spokane—ss.

R. Max Etter, being first duly sworn, on oath depose and say: That I am one of the parties to the above-entitled action, and that immediately after said case was set for trial by the Honorable Chase A. Clark, United States District Judge, and prior to the trial of said case, to-wit, on the 16th day of November, 1948, I talked by telephone with Frank P. Busch, who at said time was residing at 4218 North Second Place, Phoenix, Arizona; that I told the said Frank P. Busch that the above action was coming on for trial and I asked the said Frank P. Busch if he would be in a position to testify thereat; that the said Frank P. Busch informed me that he felt it was wholly unnecessary for him to testify in the above-entitled case because of the fact that he would testify substantially the same as one Albert W. Kienholz and Frank H. Davis, two of plaintiffs' witnesses who testified at the trial had in the District Court of Idaho in the above-entitled cause. I further state, that in view of my conversation with the said Frank P. Busch, I was, and still am of the opinion that the testimony of the said Frank P. Busch would be cumulative as concerns the testimony given heretofore in the above cause by the said witnesses, Albert W. Kienholz and Frank H. Davis.

That your affiant is further informed that the said motions heretofore filed by the defendants in this cause are not supported by the Affidavit of Frank P. Busch, to which reference is made in said motions, and in this connection I have the following to state: that on the morning of December 6, 1948, I talked with the said Frank P. Busch, by long-distance telephone at Phoenix, Arizona, and the said Frank P. Busch stated to me that he had not signed any affidavit for or on behalf of the defendant, W. L. Casey, or in support of any legal proceedings or motions then being undertaken by the said W. L. Casey, and furthermore stated that he did not intend to sign any affidavit in respect thereto; that in reply to my request to the said Frank P. Busch to confirm such conversation, the said Frank P. Busch sent a telegram to me at my office at 726 Paulsen Building, Spokane, Washington, which telegram stated as follows: "Have not signed any affidavit in case of Etter and Cullen versus W. T. Casey in Federal Court in Idaho. /s/ Frank Busch."

That, likewise, at the time that said above-entitled cause was set for trial, no objection was made thereto by defendants' counsel on the ground that certain testimony or evidence was not available to said defendants at the time of trial; that, furthermore, no request or motion for continuance was made at any time by the said defendants in the above-entitled cause, either on the day that said cause was set for trial, nor on the day said cause was tried,

and defendants stated in open court that they were ready for trial.

/s/ R. MAX ETTER.

Subscribed and sworn to before me this 15th day of December, 1948.

[Seal]     /s/ GERALD R. O'MELVENY,  
Notary Public in and for the State of Washington,  
residing at Spokane therein.

[Endorsed]: Filed Dec. 18, 1948.

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[Title of District Court and Cause.]

#### MINUTES OF THE COURT

April 18, 1949

This cause came on regularly this date in open Court on defendants' Motion for a directed verdict or in the alternative for a new trial; William S. Hawkins, Esquire, representing the plaintiffs and Messrs. George S. Young and W. J. Nixon representing the defendants.

After hearing respective counsel, the Court announced the Motion for Judgment N.O.V. or in the alternative for a new trial is denied.

April 18, 1949.



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that W. L. Casey and Jane Doe Casey, whose true Christian name is Agnes Casey, his wife, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 24, 1948.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for Appellants W. L. Casey and Agnes Casey, his wife.

[Endorsed]: Filed April 25, 1949.

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[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents: That we, W. L. Casey and Agnes Casey, husband and wife, as principals, and Saint Paul-Mercury Indemnity Company, organized and existing under the laws of the State of Delaware, as sureties, are held and firmly bound unto the plaintiffs herein in the full and just sum of Eight Thousand One Hundred Twenty One and 76/100 Dollars (\$8,121.76) to be paid to the said plaintiffs or their executors, administrators, or assigns; to which payment, well and

truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of April, in the year of our Lord One Thousand Nine Hundred and Forty-Nine.

Whereas lately at a District Court of the United States for the District of Idaho, Northern Division, in a suit depending in said Court, between R. Max Etter and William E. Cullen, Plaintiffs, vs. W. L. Casey and Mrs. Jane Doe Casey, whose true Christian name is Agnes Casey, his wife, Defendants, a judgment was rendered against the said defendants, and the said defendants having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California, or any other place where such court may sit and call this case on for hearing.

Now, the condition of the above obligation is such, that if the said principals, W. L. Casey and Agnes Casey, shall pay to R. Max Etter and William E. Cullen, the plaintiffs above named, all costs and damages that shall be adjudged against them on the appeal and shall satisfy and perform the judgment appealed from in case it shall be affirmed, and any judgment or order which the said Circuit Court of Appeals may render or order to be rendered by said

United States District Court for the District of Idaho, Northern Division, not exceeding in amount the above named original judgment, then this obligation to be void; otherwise to be and remain in full force and effect.

/s/ W. L. CASEY,

/s/ AGNES CASEY,

Principals.

SAINT PAUL-MERCURY

INDEMNITY COMPANY,

Surety,

/s/ W. J. RILEY,

Attorney-in-fact.

[Seal]

Approved:

/s/ CHASE A. CLARK,

U. S. District Judge.

Countersigned:

/s/ GEO. C. WALKER,

Resident Agent,

Boise, Idaho.

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CERTIFIED COPY OF POWER  
OF ATTORNEY

Original on File at Home Office of Company. See  
fourth line of certification hereof.

Saint Paul-Mercury Indemnity Company

Home Office: Saint Paul, Minnesota

Know All Men By These Presents: That the  
Saint Paul-Mercury Indemnity Company, a corpo-

ration organized and existing under the laws of the State of Delaware, and having its principal office in the City of Saint Paul, Minnesota, does hereby constitute and appoint W. J. Riley, 1124 Paulsen Bldg., Spokane, Washington, its true and lawful attorney(s)-in-fact to execute, seal and deliver for and on its behalf as surety:

Any and all bonds and undertakings not exceeding in penalty the sum of One Hundred Thousand and no/100 Dollars (\$100,000.00) each, and the execution of such instrument(s) in pursuance of these presents, shall be as binding upon the said Saint Paul-Mercury Indemnity Company, as fully and amply, to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal office.

This Power of Attorney is executed, and may be certified to and may be revoked, pursuant to and by authority of Article VI,—Section 6-F, of the By-Laws adopted by the Board of Directors of the Saint Paul-Mercury Indemnity Company at a meeting called and held on the 24th day of October, 1936, of which the following is a true transcript of said Section 6-F:

“The President or any Vice President or Secretary shall have power and authority:

(1) To appoint Attorneys-in-fact, and to authorize them to execute on behalf of the Company, and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and



(2) To appoint Special Attorneys-in-fact who are hereby authorized to certify to copies of any power-of-attorney issued in pursuance to this section and/or any of the By-Laws of the Company, and

(3) To remove, at any time, any such Attorney-in-fact or Special Attorney-in-fact and revoke the authority given him.”

In Testimony Whereof, the Saint Paul-Mercury Indemnity Company, has caused this instrument to be signed and its corporate seal to be affixed by its authorized officer this 12th day of February, 1948.

SAINT PAUL-MERCURY  
INDEMNITY COMPANY.

[Corporate Seal]: /s/ M. D. PRICE,  
Vice President.

State of Minnesota,  
County of Ramsey—ss.

On this 12th day of February, 1948, before me came the individual who executed the preceeding instrument, to me known, and, being by me duly sworn, said that he is the therein described and authorized officer of the Saint Paul-Mercury Indemnity Company; that the seal affixed to said instrument is the Corporate seal of said Company; that the said Corporate Seal and his signature were duly affixed by order of the Board of Directors of said Company.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal, at the City of

Saint Paul, Minnesota, the day and year first above written.

[Seal]:     /s/ C. L. JAEGER,  
Notary Public, Ramsey County, Minn.  
My Commission Expires June 2, 1953.

### CERTIFICATION

I, the undersigned, a Special Attorney-in-fact of the Saint Paul-Mercury Indemnity Company, duly appointed pursuant to and by authority of Section 6-F (2) of Article VI of the By-Laws of said Company, adopted on the 24th day of October, 1936, do hereby certify that I have compared the foregoing copy of the Power of Attorney and affidavit, and the copy of Section 6-F of Article VI of the By-Laws of said Company as set forth in said Power of Attorney, with the Originals On File In The Home Office Of Said Company, and that the same are correct transcripts thereof, and of the whole of the said originals, and that the said Power of Attorney has not been revoked and is now in full force and effect.

In Testimony Whereof, I have hereunto set my hand this .... day of ..... 19...

/s/ D. B. NIKSCH,  
Special Attorney-in-fact.

[Endorsed]: Filed April 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS UNDER RULE 19

Come now the above named appellants and file their statement of points on which they will rely on appeal.

1. That the Court erred in admitting Exhibits 1 to 5 inclusive for the stated purpose of showing the amount of labor and services performed by the plaintiffs.

2. That the Court erred in denying appellants' motion for a directed verdict made at the conclusion of plaintiffs' case.

3. That the Court erred in failing to grant appellants' motion for a directed verdict made at the conclusion of taking of testimony in this case.

4. That the Court erred in failing to grant appellants' motion for judgment n.o.v.

5. That the Court erred in failing to grant appellants' alternative motion for a new trial.

6. That the Court erred in failing to enter judgment herein in behalf of appellants and in entering judgment against appellants.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for Appellants.

Service Acknowledged April 28, 1949.

[Endorsed]: Filed April 30, 1949.

[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

Appellants designate the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint
2. Answer
3. Clerk's minutes, if any, of motion for directed verdict made at conclusion of plaintiffs' case
4. Clerk's minutes, if any, of motion for directed verdict made at conclusion of taking of testimony
5. Verdict
6. Judgment
7. Motion for Judgment n.o.v. or in the alternative, for New Trial
8. Clerk's minutes, if any, on ruling on Motion for Judgment n.o.v. or for New Trial
9. Notice of Appeal
10. Supersedeas Bond
11. Reporter's transcript of evidence and proceedings and all exhibits introduced by plaintiffs and defendants
12. Statement of points on which appellants intend to rely
13. Designation of contents of record on appeal and proof of service

14. All Clerk's minutes.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for Appellants.

Service Acknowledged April 28, 1949.

[Endorsed]: Filed April 30, 1949.

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[Title of District Court and Cause.]

APPELLEES DESIGNATION OF  
RECORD ON APPEAL

Comes now R. Max Etter and William E. Cullen, by their attorney of record, Appellees in the above entitled cause, and designate the following for inclusion in the record on appeal in addition to those portions of the record heretofore designated by the appellants;

Plaintiffs' Motion to Strike (dated December 17, 1948) with accompanying affidavits of R. Max Etter and William E. Cullen.

This designation by Appellees.

/s/ WM. S. HAWKINS,

Attorney for Appellees.

Service Acknowledged May 6, 1949.

[Endorsed]: Filed May 9, 1949.



[Title of District Court and Cause.]

### ORDER

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to July 16, 1949.

Dated at Pocatello, Idaho, this 25th day of May, 1949.

/s/ CHASE A. CLARK,  
U. S. District Judge.

[Endorsed]: Filed May 25, 1949.

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[Title of District Court and Cause.]

### CERTIFICATE

United States of America,  
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers, to-wit:

Complaint

Minutes of the Court of November 15, 1948

Answer

Minutes of the Court of November 23, 1948

Minutes of the Court of November 24, 1948

Verdict

Judgment

Motion for Judgment N.O.V. or in the Alternative for a New Trial, with Affidavit of W. L. Casey attached

Motion to Strike, with Affidavits of William E. Cullen and R. Max Etter attached

Minutes of the Court of April 18, 1949

Notice of Appeal

Supersedeas Bond

Statement of Points Under Rule 19

Designation of Record on Appeal, by Appellants

Appellees Designation of Record on Appeal

Order Extending Time for Filing Appeal

Transcript of Evidence

Exhibits:

Pl. No. 1 Contract

Pl. No. 2 Second draft of Contract

Pl. No. 3 Contract

Pl. No. 4 Contract preliminary to final draft

Pl. No. 5 Copy of final agreement

Pl. No. 6 Photostatic copy of letter, Mar. 23, 1948

Pl. No. 7 Letter dated Apr. 30, 1948

Def. No. 8 Copy of Letter, Apr. 28, 1948

Def. No. 9 Copy of Letter, Apr. 14, 1948

Pl. No. 10 Preliminary draft of letter

Def. No. 14 Statement of Cullen & Etter to Sulphur Springs, etc.

Def. No. 15 Photostatic copy of contract

Def. No. 16 Sales contract

Def. No. 17 Chattel mortgage

Def. No. 18 Receipt to W. L. Casey

are that portion of the original files as designated

by the parties and as are necessary to the appeal under Rule 75 (RCP).

In Witness whereof, I have hereunto set my hand and affixed the seal of said court, this 5th day of July, 1949.

[Seal]      /s/ ED. M. BRYAN,  
Clerk.

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[Title of District Court and Cause.]

### TRANSCRIPT

This matter was heard before Honorable Chase A. Clark, United States District Judge, sitting with a Jury at Coeur d'Alene, Idaho, on November 23, 1948

Appearances:

William S. Hawkins, Esq., Coeur d'Alene, Idaho, Attorney for the Plaintiff.

W. J. Nixon, Esq., Bonners Ferry, Idaho, George W. Young, Esq., Spokane, Washington, Attorneys for the Defendants.

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November 23, 1948, 10 o'clock a.m.

WILLIAM CULLEN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Hawkins:

Q. Where do you reside?

(Testimony of William Cullen.)

A. Spokane, Washington.

Q. What is your occupation?

A. Attorney at law.

Q. You are a member of the firm of Cullen and Etter?  
A. Yes sir, Cullen and Etter.

Q. Your office is where?

A. 726 Paulsen Building.

Q. You are licensed to practice law in the State of Washington?  
A. Yes sir.

Q. And in the Federal Court?  
A. Yes sir.

Q. When were you admitted to practice?

A. September 1936.

Q. Have you continuously practiced since that time?

A. I started to practice in May or June 1937.

Q. And have you continuously practiced since that time?

A. Excepting five years in the Marine Corps.

Q. Who is your partner in that firm?

A. My father and Mr. Etter.

Q. Are you acquainted with Mr. Casey, the defendant in this action?  
A. Yes sir.

Q. When did you first meet him?

A. I first met Mr. Casey February 25, 1948.

Q. February 1948?  
A. Yes sir.

Q. And where was that?

A. The mezzanine floor of the Davenport Hotel.

Q. At Spokane?  
A. Yes sir.

Q. Under what circumstances?

(Testimony of William Cullen.)

A. Mr. Casey asked Mr. Etter to have one of us come to a meeting of the Gypsum Company.

Q. You attended that meeting? A. Yes sir.

Q. Was Mr. Casey present? A. Yes sir.

Q. Was Mr. Kienholz?

A. Yes sir, and Mr. Davis; Mr. Bush; Mr. Myers; Ed Crowley and Mr. Denny, investigator for the Security and Exchange Commission.

Q. What was the gist of that meeting? [2\*-3]

A. Well, that was to discuss the Sulphur Springs Gypsum set-up and what could be done about Mr. Adams——

Q. Who was Mr. Adams?

A. He was a resident of Spokane who owned a majority of the stock of the Sulphur Springs Gypsum Company.

Q. He owned over fifty-one per cent?

A. Much more than fifty-one per cent.

Q. What was the purpose of that meeting—rather what did they decide?

A. They didn't decide anything; each one said what he invested and what was said by Adams, and there was a discussion of what was said and what could be done to make it a successful company. I talked to them but I didn't advise them because I didn't know whether I would be employed or not.

Q. Did they have books of account at that time?

A. I don't recall.

Q. You did get them? A. Yes.

Q. And when did you get them?



(Testimony of William Cullen.)

A. The books of account including an audit made by accountants at Thermopolis, Wyoming, was brought in the next morning.

Q. Did you meet with the Directors the next morning?

A. We met with Mr. Bush, the president of the company. [4]

Q. What was done and said at that time?

Mr. Young: I object to any conversation outside the presence of Mr. Casey.

The Court: I think he may answer with the understanding that this testimony will have to be connected up or it will be stricken. I take it this is simply preliminary.

Mr. Hawkins: That's right Your Honor.

Q. Were Kienholz, Bush, Davis and Casey the directors at that time?

A. Yes sir. As I recall Mr. Simanton brought the books in.

Q. And Mr. Bush was present?

A. Yes sir.

Q. Before Mr. Simanton brought the books of account to your office?

A. Yes sir.

Q. Were any instructions given at that time?

A. He wanted us to examine the books?

Q. He wanted you to examine the books?

A. Yes sir, and make recommendations to them as soon as possible.

Q. Did you make an examination and report?

A. Yes, we did, it is my recollection either that day or within two or three days of the time they

(Testimony of William Cullen.)

brought the books, Mr. Casey called and asked how we were getting along. They wanted immediate action and wanted to meet us as soon as they could.

Q. What did you tell them?

A. It was Wednesday Mr. Casey and Mr. Davis came to the office and told us Mr. Bush was coming——

Q. What did you do then, Mr. Cullen?

A. We went over the facts revealed by the audit and the minutes and did what briefing we could on the matter.

Q. Did you do some research and some briefing?

A. Yes, a week-end had elapsed and we spent Saturday afternoon and about half the night in the law library.

Q. Did you do any research on the law?

A. Yes we did, particularly because it was a Wyoming corporation and we were not too familiar with the Wyoming statutes.

Q. And did you familiarize yourselves with the Wyoming Law relative to this matter?

A. Yes, as far as we were able in the time.

Q. Did you have a meeting with the Board of Directors and advise them of your findings?

A. Yes sir.

Q. And when was that?

A. Well, we actually had a meeting as I recall it on Saturday afternoon about the 6th of March. However, prior to that time Mr. Casey and Mr. Davis had been in and we suggested a course of action and he said he would inform Mr. Bush. [6]

(Testimony of William Cullen.)

Q. Mr. Casey said that? A. Yes sir.

Q. Mr. Casey was in, then, two or three times?

A. Yes sir.

Q. You say you had a meeting on Saturday?

A. Yes sir.

Q. What, if anything, was recommended?

A. I have some notes here——

The Court: You may refer to them if it is necessary Mr. Cullen.

Q. Now, what was recommended?

A. On Saturday, March 6, Mr. Bush, Casey, Kienholz and Davis came to the office at about two o'clock. We went over what we found in the audit; Mr. Casey advised us that he would ask Mr. Adams to come up and a few minutes after, he came up.

Q. Did you have a meeting with Adams.

A. Yes, we did. He adopted the attitude that as long as he owned the majority of the stock he felt that he could do pretty much as he wanted to. From the audit we found that there has been royalties of fifty cents a ton assigned to Mr. Bush and royalties of fifty cents a ton from the men mining the gypsum to Casey, some notes by the company and some that Adams owed, one for \$25,000.00, one for \$50,000.00 likewise one for \$14,000 some odd against the property of the company for which the auditors could not find any consideration in the audit of the books of the company for [7] or to show why this should be against the property.

Q. Why the mortgage should have been or had been issued?

(Testimony of William Cullen.)

A. That is right, that could not be found.

Q. Mr. Bush had advanced some forty thousand dollars to the company?      A. Yes sir.

Q. And the Audit didn't show any of that money going to the company?

A. That's right, the audit didn't show any of that money going to the company; Mr. Bush had two notes signed by Mr. Adams. Mr. Adams admitted that he owed \$23,500.00 to the Probation Department of Alameda County, California, and there were other items and other royalties which were not accounted for, there were some that came into the office that were not there at the first meeting. We had a long discussion at this meeting with Mr. Adams.

Q. Mr. Casey was present?

A. Yes sir, it lasted about two hours and various directors would chime in from time to time as to how they advanced their money and what Mr. Adams told them. It was agreed by Mr. Adams that he would like to take over the company and would make an attempt to liquidate what these people had in the company.

Q. Did you discuss the question of receivership at that time?

A. That was one of the first things that Mr. Bush and Mr. [8] Casey asked us; if a receivership would help them get their money. We advised them of the difficulties of that, with them living in Washington and the property in Wyoming and the advances not showing on the books; we advised that a



(Testimony of William Cullen.)

receivership would result in large fees to the receiver and to the attorneys and nothing for them; that was decided against. After Mr. Adams left we told Mr. Casey, Mr. Bush, Mr. Davis and Mr. Kienholz that they could not—we advised them that in effect they couldn't do anything as directors and that we would represent them as individuals——

Q. Why couldn't you represent them as directors?

A. They couldn't use the company funds to get their own money back.

Q. Was it by reason of owning stock?

A. Yes, that was another reason.

Q. And they could have been outvoted?

A. Yes sir, they could.

Q. And what did you recommend?

A. That a contract be drawn up with Mr. Adams to pledge a number of shares of his stock to represent that he would pay them off, or turn over to a voting trust all of the shares of stock he controlled.

Q. Did these men—strike that—in the presence of Mr. Casey was anything said about having consulted with other [9] attorneys?

A. Yes sir.

Q. What was that?

A. In the presence of Mr. Casey, they told us that they had been to two firms who advised them there was nothing they could do?

Q. At this meeting was anything done to establish the amount invested, or coming back on the part of the individuals?



(Testimony of William Cullen.)

A. Yes sir, but I don't recall the particulars just now at that meeting.

Q. That was discussed?

A. Yes, that was, I know they told us there was roughly a hundred and fifty thousand dollars they had in there together.

Mr. Hawkins: Handing you Plaintiff's Exhibit 1 will you state what it is?

A. That is the first contract we drew up looking toward a liquidation of the individual's investments in the Sulphur Springs Gypsum Company.

Q. Was that drawn at the request of Mr. Casey and his associates? A. Yes sir, it was.

Mr. Hawkins: I offer this exhibit in evidence—I wonder if I may ask another question?

The Court: Go ahead. [10]

Q. This draft was prepared or drawn in your office?

A. Yes sir, prepared by Mr. Etter and myself.

Mr. Young: We object to that, it is a draft of pages one to five and not signed; it has a number of marginal writings on it; it does not purport to bind anyone; it is something prepared in a law office and probably never used. We object to it as incompetent and immaterial.

The Court: You intended to re-offer it after your question?

Mr. Hawkins: That's right, I did so intend.

The Court: It may be admitted.

Q. Did you go over this Exhibit 1 with Casey and his associates?

(Testimony of William Cullen.)

A. We went over it with him.

Q. And the pencil notations were made as a result of that conversation?      A. Yes sir.

Q. Now, Mr. Cullen, you have been handed Plaintiff's Exhibit 2. State what it is?

A. That is the draft which was a result of the conversation held on this contract with various members—rather with various individuals we represented.

Q. Exhibit 2 is a result of the conferences after drawing Number 1? [11]

A. That is correct?

Q. Did you have a conference concerning Exhibit Number 2?

A. Yes, we had a conference concerning Exhibit 2 also.

Q. Were these conferences on different days?

A. Yes, sometimes one would come and sometimes all would come.

Q. Did Mr. Casey go over these drafts with you?

A. With Mr. Etter and myself, I think he was there with Mr. Davis and Mr. Biggerstaff.

Q. Were these notations made as a result of conferences?

A. Yes sir, I remember he asked us to put in the name of Wyoming Mineral Products Company; that was his company.

Q. He asked you to put that in?

A. Yes sir.

Mr. Hawkins: I offer in evidence Exhibit 2 marked for identification?

(Testimony of William Cullen.)

Mr. Young: We make the same objection which was heretofore made?

The Court: The same ruling. This only goes to show the amount of work, that is the only purpose for which it is admitted.

Q. Now, Mr. Cullen, handing you Exhibit Number 3 I will ask you to state what that is, if you know?

A. That is two sheets from the contract we drew concerning this same matter. This was taken up in Mr. Casey's presence. At that time Mr. Adams had a lawyer from [12] Billings to represent him. We talked about this provision about the Adult Probation Department; Mr. Adams said they were going to raise the money and said that he couldn't do it—rather Mr. Huntington said they wouldn't do it without these matters adjusted and——

Q. Now, Mr. Cullen, who was he—Mr. Huntington?

A. An attorney from Billings.

Q. Then this is two sheets prepared as a draft by you?

A. We designated what each party claimed. Mr. Adams told us what each had coming and we put that in the final draft of the contract.

Mr. Hawkins: I offer Exhibit marked 3 in evidence at this time.

Mr. Young: I am making the same objection, however, in view of the statement of the Court, I understand none of these documents are binding on my client.

(Testimony of William Cullen.)

The Court: These are just to show the amount of labor done in order to arrive at a fair fee. It may be admitted for that purpose. The same ruling applies to the other exhibits.

Q. Handing you Exhibit Number 4 will you state what that is?

A. Yes sir, this is the contract immediately preliminary to the final draft. We went over this in the presence of most all of the people we represented including Mr. Casey and also Mr. Huntington and Adams. We spent [13] most of a Saturday afternoon going over this.

Q. They had copies of this?

A. We had prepared about six copies. I think they all looked it over. I am sure they all read it at that time.

Q. Mr. Huntington went over this with you; he representing Mr. Adams.

A. Yes sir.

Q. Mr. Davis, Mr. Kienholz, Mr. Casey and Mr. Bush were present?

A. Yes sir.

Q. And had copies of this instrument?

A. Yes sir.

Q. And actively participated in the discussion of the points involved?

A. Yes sir. When this discussion was going on we were seated all around and I got from each what he claimed he had advanced to the company or Mr. Adams.

Mr. Hawkins: We offer this exhibit in evidence.

Mr. Young: The same objection I have hereto-



(Testimony of William Cullen.)

fore made. It is incompetent, irrelevant and immaterial.

The Court: It may be admitted for the same purpose as the other exhibits.

Q. Now you have been handed Exhibit numbered 5, I will ask you to state what that is? [14]

A. This is a copy of the final draft of the agreement entered into by Mr. Adams on one side; Mr. Bush, Mr. Kienholz, Mr. Davis, Mr. Casey, The Wyoming Mineral Products Company, Mr. Simanton, Mr. Biggerstaff, Mr. Raydk and Mr. Evers and Anderson Brothers on the other. After Mr. Adams put his name on, then these names were put on, people we represented.

Q. This was the final draft? A. Yes sir.

Q. Was it signed by all the parties to the contract?

A. By everyone present on the date it was presented, it was not signed by Mr. Casey.

Q. He was not present at that time?

A. No sir, he wasn't.

Q. At page four is there outlined the claims of the respective parties? A. Yes sir.

Q. What is the claim of W. L. Casey?

Mr. Young: Objected to as incompetent, irrelevant and immaterial. The contract was never signed by Mr. Casey, that is why it would not be a representation of what his claims were?

The Court: He may answer.

A. \$69,500.00.



(Testimony of William Cullen.)

Q. Was that the confirmed figure by Mr. Casey?

A. He arrived at that with Mr. Adams after a long discussion in front of all of us. He thought he had more coming and said he would go to Thermopolis and check it with the men at the mine and return and give us the accepted figure.

Mr. Young: Mr. Casey never signed Exhibit 5 did he Mr. Cullen? A. No, he never signed it.

Mr. Young: We object to that as incompetent, irrelevant and immaterial and not binding on Mr. Casey.

The Court: Was it offered.

Mr. Hawkins: I intended to offer it, and will at this time.

The Court: It may be admitted.

Q. Referring back to exhibit which was admitted, number five. Did Mr. Casey have a copy of that contract?

A. He requested and received a copy from Mr. Etter before he went to Thermopolis.

Q. Handing you Exhibit marked number 6 I will ask you to state what it is?

A. That is a copy of a letter written by Mr. Casey to Adams setting forth the amount he arrived at under this contract; that he and Mr. Adams agreed on.

Q. They finally agreed what Mr. Casey had coming? [16] A. Yes sir.

Q. How did you get possession of that photo-static copy?

(Testimony of William Cullen.)

A. It was around the 5th or 6th of April Mr. Adams called me from Bonners Ferry and said that he was going to meet with Mr. Casey and arrive at these figures and that he would like to come to the office when he was through. After I had gone home to dinner Mr. Casey called me and said he had been in conference with Mr. Adams and they finally arrived at what he and Mr. Adams agreed that Mr. Casey put into the company, and that Casey thought he had a great deal more coming and that he would send me a copy of it.

Q. Who delivered the letter?

A. Mr. Adams brought in the signed instrument and showed it to me to show that Casey had agreed to it. He said: "I will have a photostat of it and bring you a copy because Mr. Casey wanted you to have one."

Q. And is that the photostat? A. Yes sir.

Q. Where did Mr. Casey call you from?

A. Bonners Ferry.

Mr. Hawkins: We offer Exhibit 6 in evidence.

Mr. Young: No objection.

The Court: Admitted.

Q. Did you later talk to Mr. Casey about that?

A. Mr. Casey called me about ten minutes after Adams left and asked if Adams had been there with a copy and I asked him if he had Mr. Adams sign his copy and he said Adams signed several copies and he would have it up there.

Q. It says there "March 23," is that the same date as the contract?

(Testimony of William Cullen.)

A. It is the same date as the contract. I understood Mr. Casey had it that way—I understood from Casey that he had it that way to show that he agreed with the contract.

The Court: As to what he understood from Casey would be incompetent.

Q. When did Mr. Casey sign that letter?

A. He told me over long distance that he signed it Monday—when he called me on Monday.

Q. Was that March 23rd?

A. On April 5th or 6th I have a note on this, when he called me from Bonners Ferry. May I refer to that?

The Court: You may do that.

A. Yes, it was Monday April 5 he called me that he had been in conference.

Q. Did he tell you about the date it bore?

A. He said “wasn’t that contract signed March 23” and I said “yes” and that is all the conversation we had about that.

Q. Was Casey in your office after that? [18]

A. Yes sir, many times.

Q. Concerning this?

A. Yes, concerning this same subject matter.

Q. Was Mr. Keinholz with him?

A. Frequently.

Q. Were Mr. Busch and Mr. Davis with him?

A. Yes sir, repeatedly, but Casey was the most frequent visitor.

Q. What was the subject of conversation on those visits?

(Testimony of William Cullen.)

A. Shortly after this, on Tuesday the 13th Mr. Casey called the office and talked to me, he wanted advice as to whether he should make payment on this note that Mr. Adams and the company owed to the California Board and I said I didn't think he should pay it, and he said that he would be in in the afternoon when Mr. Etter would be back from the Court house to talk to both of us; he did come in and he brought some of his stationery, the Wyoming Mineral Products Company stationery and we wrote a letter to a man named Liner in California who had the note that Adams had given—anyway the letter was concerning the note Adams had given, of the Sulphur Springs Gypsum Company, for what he owed the Probation Department.

Mr. Young: I fail to see the materiality of this matter.

The Court: With the understanding that it will be connected up it may remain.

We will take a ten minute recess at this time. [19]

November 23, 1948, 11:05 a.m.

Q. Mr. Cullen, after this letter—this photostat of the letter was brought to your office what happened then?

Mr. Young: What do you refer to now?

Mr. Hawkins: I think it was Exhibit 6.

A. That was the 5th of April. After that all of the people we represented, including Mr. Casey were in the office and called many times. I think we

(Testimony of William Cullen.)

had some contact with one or more of them every day from that time until the last of April.

Q. Do your records show how many times Mr. Casey called at your office?

A. My recollection is that he telephoned or was in the office about thirty-one times.

Q. Did you testify that you were paid five hundred for the examination of the corporate books?

A. I don't know whether I testified, but we were paid five hundred.

Q. When was that?

A. We billed the Sulphur Springs Gypsum Company right after the first conference with Mr. Adams. As I recall it was about the sixth of March and then that was about the 9th, yes, after we billed the company?

Q. When were you paid?

A. I think we billed them that afternoon and we were paid on [20] the 9th, I think it was.

Q. You were paid prior to the time this contract was drafted at all, is that right? A. Yes sir.

Q. Did you go to Montana in connection with this matter. A. Yes sir.

Q. Who accompanied you?

A. I went by myself but Mr. Casey flew over. I went on the train.

Q. What was the purpose of that trip?

A. To collect the money due on the assignment from the Sulphur Springs Gypsum Company to the new investors.

Q. Did that involve drawing corporate proceedings?



(Testimony of William Cullen.)

A. We drew minutes for the two directors—in Spokane to have two new ones elected, and Mr. Casey went over to have a quorum present there.

Q. What did you do in Montana?

A. We had an all day's conference. It was Thursday the 6th of May, we had an all day's conference in the office of Mr. Huntington and I received a check to myself and Mr. Etter for \$88,400.00.

Q. For \$88,400.00?           A. Yes sir.

Q. What was that for? [21]

A. To represent the interest of everyone on the contract except Mr. Casey.

Q. Did you receive any other check?

A. Yes sir, it was handed to me.

Q. What was that?

A. \$16,800.00 made out to Mr. Casey.

Q. By whom was it handed to you?

A. Mr. Charles Vandenhook.

Q. You gave it to Mr. Casey?           A. Yes sir.

Q. Had he previously received any money?

A. A substantial amount before we went to Montana.

Q. How much?

A. He told me about \$40,000.00.

Q. Anything else?

A. A ten thousand dollar note signed by Mr. Adams and George Stinton—I found that out—

Q. That would be about \$50,000.00?

A. Yes sir.

(Testimony of William Cullen.)

Q. What did he say about getting the \$40,000.00?

A. I didn't know that he had received that until the Saturday morning just prior to the time I went to Montana, I got a letter from Mr. Huntington——

Mr. Young: The letter would be the best evidence. [22]

A. He didn't say that he had paid any money. He said Mr. Casey had turned over the workings of the company.

Q. Do you have the letter?

A. I think it is there.

Q. Did you talk about this \$40,000.00?

A. He told me on Monday night that he had gotten the money so that these people would be in a substantial sum and wouldn't back out on their agreement.

Q. These people who were refinancing this company, in Montana? A. Yes sir.

Q. Are those the people that put up the \$88,000.00 that you brought back? A. Yes sir.

Q. And the \$16,000.00 check? A. Yes sir.

Q. Did Mr. Casey get a note?

A. He received a note for \$2,000.00 signed by Mr. Adams personally.

Q. Then he got \$40,000.00 cash, a ten thousand dollar note, a sixteen thousand dollar check and a two thousand dollar note? A. That is correct.

Q. After these moneys were paid over did you have a conversation with Mr. Casey that day?

A. We had several conversations, one immedi-

(Testimony of William Cullen.)

ately after the money [22a] paid over and we turned over the books and seal and stock that I had in my possession, to Mr. Huntington who represented the new company.

Q. Was there any money transferred?

A. Mr. Casey turned over the funds he had in his possession of the Sulphur Springs Gypsum Company.

Q. Do you remember the amount of money?

A. Slightly over twenty-six hundred dollars.

Q. Were all of the assets of the Sulphur Springs Gypsum Company turned over to the new company at that time.

A. All the assets and obligations were turned over.

Q. Did you have any further conversation with Mr. Casey that day?      A. Yes sir.

Q. Where?      A. In the lobby of his hotel.

Q. That is where?

A. At Billings, Montana.

Q. When was that?

A. About 7:30 in the evening.

Q. What date?

A. Thursday the 6th of May.

Q. What was the substance of that conversation?

A. I went into the hotel and he was talking to Mr. Jensen, whom I met previously, Mr. Casey commented on how lucky [23] we had been today. He said "as soon as I get back to Spokane I will get hold of the other boys and tell them what a wonder-

(Testimony of William Cullen.)

ful job you have done; I am going to pay you myself, several thousand dollars.”

Q. Did you have any further conversation that day?           A. Not that day.

Q. When did you have any further conversation?

A. I got back Saturday morning and called all the people concerned, including Mr. Casey,—I called Mr. Casey’s office, and then on the following Tuesday he called me in the morning.

Q. Mr. Casey called you?           A. Yes, sir.

Q. He talked to you?           A. Yes, sir.

Q. What was the substance of that conversation?

A. He had just gotten back from Montana and asked if I had deposited the check; he said “there is nothing to worry about,” he said “I rode back to Bozeman” and then he said “I know I owe you quite a bit of money and I will be in to see you later in the week, be sure to tell me when you are meeting with the others.”

Q. Did you notify him?

A. I told him I was having a meeting Friday and he said he would be there. [24]

Q. He said he would be there?

A. I think his words were “I will be there for sure.”

Q. Did he come?           A. No, sir.

Q. Did he ever come to your office again?

A. Never did.

Q. Did you talk to him again about this matter?

(Testimony of William Cullen.)

A. Yes, sir.

Q. When and under what circumstances?

A. We had a meeting with the other people we represented except Mr. Simanton and Mr. Davis who were out of town and at the end of the conference Mr. Busch suggested that I call Mr. Casey.

Q. Did you call him?

A. Yes, sir, and he told me that he had gotten to work late and that he couldn't come over and he knew that he owed us quite a bit of money and that he would come over the next morning, or the following Monday.

Q. Did he come?           A. No, sir.

Q. Did he come the next Monday?

A. No, sir.

Q. Did you call him?

A. I called him before five o'clock, I wanted to go home early; [25] he wasn't in and I have never talked to him since.

Q. Did the other parties to this contract pay you your fees?           A. Yes, sir.

Q. Did Mr. Casey?           A. No, sir.

Mr. Young: We object to this question, he asked if the parties to this contract, and Mr. Casey did not sign the contract.

The Court: The only question here is whether Mr. Casey owes these gentlemen a fee and how much, it doesn't make any difference what the others paid him, if anything, does it.

Mr. Hawkins: At this time I offer in evidence plaintiff's exhibit 7 marked for identification.



(Testimony of William Cullen.)

The Court: It may be admitted.

Q. Mr. Cullen, as one of the parties who rendered this service, what is your opinion as to the worth of the services rendered to Mr. Casey?

Mr. Young: We object to this unless he states some facts. He would be entitled to pay only up to a certain point, as I view it, when he was informed that Mr. Casey was handling the matter.

The Court: I will permit him to answer this question. [26]

A. I think it is worth fifteen thousand dollars at least.

Q. What factors do you take into consideration. What are some of the elements?

A. The experience I have had; the fact that Mr. Casey was not a regular client but had just come in on this transaction; the fact that there was a large sum of money involved and the fact that we were dealing with Mr. Adams, we didn't know that we would get anything and we were much more successful than we expected to be.

Mr. Hawkins: You may inquire.

#### Cross-Examination

By Mr. Young:

Q. You first met Mr. Casey when he was attending a meeting of the Board of Directors and stockholders of the Sulphur Springs Gypsum Company on the mezzanine floor of the Spokane Hotel?

A. A general meeting concerning the Company, yes, sir.

(Testimony of William Cullen.)

Q. You were at their meeting?

A. Yes, sir.

Q. And you had other meetings with the Board of Directors of the Company?

A. That is correct.

Q. As a result of these meetings the Company employed you to look into the internal matters of the Company?

A. Yes, sir. [27]

Q. The Company authorized a retainer of five hundred dollars?

A. That is correct.

Q. You were paid five hundred dollars?

A. Yes, sir.

Q. There was the matter of the management of the corporation that was particularly troubling the Board of Directors and the stockholders?

A. Yes, sir.

Q. Concerning several matters?

A. Yes, sir.

Q. Mr. Casey was put on the Board of Directors succeeding some old member of the Board of Directors that had existed before?

A. He and Mr. Busch, Mr. Keinholz, Mr. Simanton and Mr. Davis were all elected December 15, 1947.

Q. That was a result of a sort of revolution that took place with the Sulphur Springs Gypsum Company?

A. That was my understanding.

Q. When Mr. Casey met with you in the office other members of the Board of Directors were along?

A. Sometimes and sometimes not.

(Testimony of William Cullen.)

Q. As a result of these meetings and conversations had with Mr. Casey and the other members of the Board of Directors you prepared a contract for the signature of the parties?

A. For the signature of the people we represented, yes, sir.

Q. The purpose of that contract was to work out a reorganization [28] of the Sulphur Springs Gypsum Company?

A. So each one could get back the money he had in the Company.

Q. It was intended when the contract was performed that there would be a new ownership of the Sulphur Springs Gypsum Company?

A. Yes, sir.

Q. In this contract you provided for attorneys' fee which you were to be paid?

A. Not entirely, no.

Q. I call your attention to paragraph 12 of the contract in which this language is used: "The said party of the first part does also agree that the law firm of Cullen and Etter,"—now the first part was Mr. Adams?

A. Yes, sir.

Q. "The said party of the first part does also agree that the law firm of Cullen and Etter, 726 Paulsen Building, Spokane, Washington, shall represent and shall perform all such services as may be necessary in the effectuation of any part of this agreement relative to the settlement thereof by the parties of the second part and relative to the oper-

(Testimony of William Cullen.)

ation during the period so specified herein of the Sulphur Springs Gypsum Company; and said attorneys may accept in Trust, if offered, other claims for payment by said party of the first part, including shares of stock in the [29] said Sulphur Springs Gypsum Company, notes signed by the Company or the first party, or other evidences of indebtedness so signed; and the first party does hereby agree that the services of such named attorneys shall be a legitimate claim which shall be paid at the time set for performance for the payment of claims herein by the party of the first part; and it is likewise agreed by said party of the first part that such claims shall be entitled to payment to the extent of not less than \$4,000.00," that was the figure fixed?

A. We put four thousand dollars in there but it was for a different reason?

Q. "Subject to such revision as may be necessary for work done by said attorneys which is not now contemplated by this agreement"?

A. That is correct.

Q. What work was not contemplated in the agreement. What work were you going to do after this agreement assuming that the contracts were performed?

A. Turning the books of the corporation to the new parties or in the event that Mr. Adams didn't liquidate each individual's obligation we would have control of the Company as the contract provides.

(Testimony of William Cullen.)

Q. If Mr. Adams performed the terms of this contract all that you would have to do was the ministerial work; the transferring [30] of the assets delivered to your possession, to the new owner or the new Company?

A. That might be so if he carried out his part.

Q. You were paid as provided in the contract?

A. Not in that way.

Q. You have been paid approximately six thousand dollars?

A. By each individual on the contract.

Q. Have you been paid as a result of this transaction, six thousand dollars?      A. Yes, sir.

Q. In addition to the retainer of five hundred dollars?

A. Paid for work we did for the company?

Q. You were given an expense check in Billings for \$150.00?      A. Yes, sir, \$150.00.

Q. From the Sulphur Springs Gypsum Company?      A. That is correct.

Q. Under the terms of this contract Mr. Adams agreed to procure a purchaser or purchasers for the Sulphur Springs Gypsum Company within a period of six months at a price sufficient to take over the stock, to buy every stockholder out and pay him six per cent with the amount of his investment?

A. That is correct.

Q. As an assurance of the performance of the contract he delivered or agreed to deliver fifty thousand shares of the stock of the Sulphur Springs



(Testimony of William Cullen.)

Gypsum Company to be forfeited [31] in the event he failed to perform the contract within six months?

A. That is correct.

Q. Following the entering of the contract under these terms, Mr. Adams went out and procured a buyer and then notified you that he was ready; that the buyer had cash arranged for and that all that was left for you to do was go to Billings, get the money and have it paid over to you, and you in turn pay it to the people whom you represented?

A. That is correct, but it was not as easy as you make it sound.

Q. What difficulty was there; Mr. Adams put up the money, or arranged to have you given the money and all you had to do was to make the proper receipt and put it in the bank account and pay it out to the people you represented. That was all there was to it? A. No.

Q. What else?

A. When we got to Billings,—well, before we got to Billings several things came up, and then we spent a whole day in Billings fighting and wrangling, and at lunch there was better than fifty per cent of the people that would not——

Mr. Young: ——Just a moment, Mr. Cullen.

Q. ——Isn't it a fact that Mr. Casey had forty thousand dollars of these peoples' money so that they couldn't back out? [32]

A. Yes, he told me he had forty thousand dollars.

Q. And they paid you the money and you put

(Testimony of William Cullen.)

it into your account and paid it out to the clients you represented, that is, you paid them the amount that you thought was coming to them, or the amount you thought was their share, isn't that correct?

A. Not that I thought was their share, what they said was their share.

Q. The only contract that you had for attorneys' fees ran between you and Adams and is represented by the final draft of your contract which you have put in evidence, which I believe is exhibit number 5?

A. That is not so.

Q. I call your attention to this fact; when this contract was submitted to Mr. Casey in its final form, it was in your office?

A. What do you mean?

Q. You mentioned that Mr. Casey got a copy of the contract as finally drawn between Adams and the clients you represented?

A. Yes, he came to get a copy so he could go to Wyoming and show it to the people mining the property.

Q. Did you request him to sign it?

A. No, I didn't.

Q. Did you expect him to sign it at the time you gave it to him? [33]

A. No, I didn't, no one was to sign until Mr. Adams did.

Q. As a matter of fact Mr. Casey declined to sign the contract?

A. After we had Adams sign I never asked him to sign it.

(Testimony of William Cullen.)

Q. You never asked him? A. No, sir.

Q. This agreement was prepared by you and Mr. Etter? A. Yes, sir.

Q. Paragraph one has this language: "That this agreement shall be binding on each and every individual who signs the same to the full extent of his obligation undertaken under the terms of this agreement, and no other." It was your intention that these individuals that you represented would deal with you separately for the purpose of collecting their respective sums?

A. I don't think I understand you. We represented them separately if that is what you mean.

Q. What you were getting at was you wanted a contract that would protect you in the attorneys' fees and in the matter of handling this business?

A. No, sir.

Q. What was the purpose of this agreement and specifying the attorneys' fees to be paid and then specifying that it should not be binding on anyone other than those who signed?

A. We were employed by people whom we represented to get Mr. [34] Adams' signature on the contract and to get a pledge of his stock; to have him agree if he couldn't raise the money that he would turn over stock that represented the control of the company. During negotiations with Adams' Attorney it was understood if he didn't carry out the contract certain items listed as advances would have to be paid,—this had been entered into prior

(Testimony of William Cullen.)

to the time these individuals had been elected to the Board of Directors, and showed on the books of the Company and were valid so far as the Company records showed. One was four thousand dollars, thirty-five hundred of which went to Huntington prior to December 15 and five hundred dollars for work after that date,—after the date of the election and we put that in as a bargaining point on the whole item.

Q. This language is rather simple: "This agreement shall be binding on each and every individual who signs the same, to the full extent of his obligation undertaken under the terms of this agreement, and no other." You intended the agreement was to be binding on only those who signed it?

A. That is correct.

Q. Mr. Casey didn't sign it?

A. No, he didn't sign it.

Q. The agreement provides that Fifty thousand shares of Sulphur Springs Gypsum Company stock is to be delivered to Mr. [35] Casey and some other men by Mr. Adams to be held in trust by them?

A. Yes, sir.

Q. That fifty thousand shares was never delivered to Mr. Casey as Trustee?

A. Yes, it was.

Q. When was it delivered?

A. In our office to Mr. Casey and Mr. Busch.

Q. Did they take it?

A. They didn't physically take it; he brought it and Mr. Busch turned it to us to hold.

(Testimony of William Cullen.)

Q. Mr. Casey in failing to sign this didn't become Trustee for this fifty thousand shares of stock. You don't contend that he became Trustee of the stock?

A. No, I don't,—he did agree with the instrument——

Mr. Hawkins: ——I shall object to this, it is argumentative.

The Court: They are a couple of lawyers, let them argue.

Q. Now, as a matter of fact, when this contract was executed, it provided the terms of a settlement between Mr. Adams and the other stockholders of the Sulphur Springs Gypsum Company?

A. Yes, sir. [36]

Q. The contract embraced the terms of the settlement? A. That is not correct.

Q. All that remained was for Adams to perform?

A. Yes, sir, or fail to perform.

Q. He did perform? A. Yes, sir.

Q. Mr. Adams paid you the fee he agreed to under the terms of the contract?

A. No, sir, Mr. Adams didn't.

Q. Who did pay you?

A. I got hold of some money,—the check was signed by Charles Vandenhook, I understood the money came from Sinton.

Q. Mr. Cullen, you and Mr. Adams agree as to the amount of attorneys' fee he was going to pay you? A. I don't so understand.



(Testimony of William Cullen.)

Q. Didn't he pay you two thousand dollars in addition to all the sums of money that he, in this agreement, agreed to pay?

A. In addition you say?

Q. Yes.

A. We got something all right but all the items were cut.

Q. You arrived at what the attorneys' fee would be, what Mr. Adams owed you,—you arrived at an agreement and accepted? [37]

A. We never felt that Mr. Adams owed us anything.

Q. The agreement runs from Adams to these other persons in the contract?

A. That's right.

Q. The agreement provides for a four thousand dollar attorneys' fee?

A. Yes, that was put in, as I said, as a bargaining point because Mr. Huntington claimed that much money.

Q. And then Adams was to have a cut on that fee provided he produced within sixty days?

A. I don't understand.

Q. The fee was to be reduced in the event that Adams completed the terms of the contract within sixty days?

A. This is the first time I ever heard that.

Q. How much did Adams pay you as attorneys' fee?

A. He didn't pay anything.

Q. He didn't pay you anything?

(Testimony of William Cullen.)

A. He didn't pay anything, we got certain sums of money under this contract and we brought it back and gave it to the people we represented.

Q. You received two thousand dollars more than specified in the contract?

A. We actually received, if you would add up all these items due the people we represented, less Mr. Casey, we collected less than these items total by some Thousand dollars. [38]

Q. You received Six Thousand dollars, obviously that is Two Thousand dollars more than the amount provided in the contract?

Mr. Hawkins: Now, we object to that as entirely argumentative.

The Court: I think the only question is whether there was a contract between him, or between this firm,—the plaintiffs and Mr. Casey and whether Mr. Casey owes them anything.

Q. Now, Mr. Cullen, you say that Mr. Casey owes you Fifteen Thousand dollars because of these services you rendered in connection with this contract?

A. I feel he does.

Q. Your services were all,—strike that, please,—the only services that you rendered after you entered into this contract was the services of going to Billings, Montana, spending a day there and drawing some Board of Directors' minutes or corporate minutes and taking some money, putting it in your pocket and bringing it to Spokane, after you completed all your services in connection with the contract?

A. That is not correct.

(Testimony of William Cullen.)

Q. What services did you render in addition to what I suggested?

A. I think I have said that Mr. Casey brought in a letter which he wanted us to write to this Attorney. [39]

Q. Including the letter you wrote, what other service did you perform?

A. Mr. Casey, about the end of April brought in an advertisement from the Billings paper it was concerning the owners of the Wyoming soil sulphate, purportedly by the Wyoming Mineral Products Company. He wanted us to write to Mr. Huntington and see why this was in the paper and so on and so forth.

Q. You wrote another letter, then, now, what else did you do following the preparation of exhibit 5, the contract?

A. After it became apparent that Mr. Adams was going to perform on this contract Mr. Casey was in the office seeking advice as to his individual dealers for the distributing of this soil sulphate.

Q. What did you do in connection with that?

A. I consulted with him and Mr. Etter and I drafted a rough contract and gave it to him.

Q. Have you that contract? A. No, sir.

Q. What else did you do for Mr. Casey?

A. I assisted him in negotiating the amount he was to get while I was in Billings.

The Court: We will recess at this time until 2 this afternoon. [40]

(Testimony of William Cullen.)

2 o'Clock P.M., November 23, 1948

The Court: You may proceed.

Q. Mr. Cullen, have you told us everything that you then did, every service that you rendered by way of professional service other than the contract which you ultimately prepared, which was executed by Mr. Adams and the other persons signing it?

A. Yes,—getting the contract signed was the easiest part of the job.

Q. Have you told us everything else by way of services that you claim in the way of rendering services for Mr. Casey, other than the contract, exhibit 5? A. Yes, sir.

Q. Taking the letter that you wrote concerning the advertising matter in the Billings, Montana, paper. Have you a copy of that?

A. Yes, we have a copy.

Q. Will you produce it? A. Yes, sir.

(Whereupon the letter was produced.)

Q. Now, then, the other letter you wrote; you did write another? A. Yes, sir.

Q. That was to California?

A. Yes, to Mr. Liner.

Q. Have you a copy of that letter you wrote to California? [41]

A. I might add that Mr. Etter wrote that.

Q. That was a form letter?

A. Not on our stationery, it was one that we helped Mr. Casey draft?

(Testimony of William Cullen.)

Q. Now, these two letters,—what are the exhibit numbers?

A. The letter to Fred G. Huntington is exhibit 8 and the one to Irving M. Liner is exhibit 9.

Q. Exhibit 8 was written because of some confusion or it was thought there would be some confusion in the advertising, or caused by the advertising in the Billings paper, involving the operation of the Sulphur Springs Gypsum Company?

A. No, sir, it wasn't.

Q. What was that?

A. It was signed by the Wyoming Mineral Products Company which was,—Mr. Casey told us, his Company.

Q. That letter was written on behalf of the Wyoming Mineral Products Company?

A. And Mr. Casey.

Q. You know the Wyoming Mineral Products Company is a corporation?

A. Yes, sir.

Q. And the letter was for the corporation?

A. And Mr. Casey. [42]

Q. Did you bill the Wyoming Mineral Products Company?

A. No, sir, I included it in the work for Mr. Casey.

Q. Did you bill Mr. Casey for that?

A. No, sir.

Q. The letter to Mr. Liner was on behalf of the Sulphur Springs Gypsum Company?

A. Mr. Etter wrote that letter, I understood from Mr. Casey that it was for him.



(Testimony of William Cullen.)

Q. What did he tell you?

A. He told us Mr. Adams had been cited down by the Probation Board and he had to make some payment on this note, that the Sulphur Springs Gypsum Company,—that he wanted to pay some money on it so Adams would not be sent back to jail?

Mr. Young: We move to strike that as not responsive.

The Court: It may stand.

Q. The fact is that the Sulphur Springs Gypsum Company was making a payment to some of the creditors of Mr. Adams down in California?

A. They had done, but not since this Board of Directors took over.

Q. The purpose was to assure the creditors that the Sulphur Springs Gypsum Company would make this payment; that it was undergoing a reorganization,—isn't that correct? [43]

A. That is not the way I understood it.

Mr. Young: I offer exhibits 8 and 9 in evidence?

Mr. Hawkins: No objection.

The Court: Admitted.

Mr. Young: This is a letter dated April 13, 1948, over the signature of W. L. Casey, addressed to Mr. Irving M. Liner, Latham Square Building, Oakland, California. "Re. H. J. Adams and Adult Probation Department County of Alameda.

"Dear Sir,—This will advise that a new Board of Directors went into office on the 17th day of

(Testimony of William Cullen.)

December, 1947. The New Board has spent considerable time securing a full accounting during this change-over, of the company's bills, potential income, assets, liabilities, etc., following and during which the office of the Company has been moved to Spokane, Washington.

"Inclosed herewith you will find a check for \$500.00 which is sent at this time for application upon the note involved."

"The Company has not been able to work at capacity during the winter months, chiefly due to weather conditions, and for that reason income has been light. There is, however, an increased demand for the product and the company expects to become increasingly busy. You are now probably [44] aware of the fact that an option contract has been executed to dispose of the assets of the Sulphur Springs Gypsum Company and when this is done it is expected that payment will be made in full. Yours very truly"

Q. Now, isn't it a fact that this letter exhibit 9 was prepared and written on behalf of the Sulphur Springs Gypsum Company. There is no question about that is there?

A. I think it was written for Mr. Casey.

Q. For him individually?

A. That is what I think.

Q. The only information is what is contained in the letter?      A. And what he told us.

Q. Mr. Casey was at that time a member of the

(Testimony of William Cullen.)

Board of Directors of the Sulphur Springs Gypsum Company?      A. He was.

Q. The second letter for which compensation is claimed is—strike that,—Mr. Huntington was representing the buyer of the Sulphur Springs Gypsum Company?

A. He represented Mr. Adams.

Q. Mr. Adams and the purchaser or purchasers of the Sulphur Springs Gypsum Company?

A. That is correct.

Mr. Young: Exhibit 8 is as follows:

“April 28, 1948” addressed to Mr. F. G. Huntington, Attorney at Law, Billings, Montana. [45]

“Dear Mr. Huntington,—Mr. W. L. Casey of the Wyoming Mineral Products Company has brought in to our office a copy of an advertisement purportedly inserted by the Wyoming Mineral Products Company in the Billings paper. This Advertisement was entirely unauthorized by the company and grossly misrepresents several facts. The board of directors of the Sulphur Springs Gypsum Company met on Monday and they, too, are concerned about this advertisement as it vitally affects the product which they are mining and having distributed. It is our understanding that this advertisement must have been placed in the paper by Mr. Adams in view of the fact that the box number given was one which he uses when he is in Billings.

“The people whom we represent are also further concerned because the Anderson Brothers, from

(Testimony of William Cullen.)

Thermopolis, Wyoming have reported to them that Mr. Adams personally told them he was moving a new contractor on to the property and they could leave their machinery and get out. Of course, this is not the intention or the purpose of the contract of March 23rd and it is certainly not our understanding of the actions to be taken by Mr. Adams. We would like to have some explanation of the above actions because as far as the people whom we represent here in Spokane are concerned, they have done everything to carry out the terms [46] of this contract in good faith. Contrariwise, Mr. Adams' actions would indicate either a lack of intelligent procedure or a distinct breach of good faith.

“Please give this matter your immediate attention and let us hear from you at your early convenience. Very truly yours, Cullen & Etter, By William E. Cullen.”

Q. Now, that letter was written at the time you were employed by the Sulphur Springs Gypsum Company, was it not, April 28?

A. It was at the time we were employed by the individuals.

Q. You also had employment from the Sulphur Springs Gypsum Company?

A. We had prior to that time.

Q. Incidentally, was that letter written before you went to Billings?

A. Just prior,—as a matter of fact the letter was never sent.

(Testimony of William Cullen.)

Q. The letter never left your office?

A. That is correct.

Q. Following the date of that letter, the Sulphur Springs Gypsum Company made available to you the sum of \$150.00 to go to Billings?

A. That's right, to take over their books and records.

Q. Do you know how many stockholders the Sulphur Springs Gypsum Company had?

A. No, I don't know exactly, I would say about forty. [47]

Q. That is your estimate, about forty.

A. Yes, I would think so.

Q. If I were to tell you that they had fifty-one, would that seem out of line?

A. That would seem all right.

Q. Do you know that Mr. Adams settled with all the stockholders exactly on the same basis that your clients were settled with?

A. No, I don't know myself.

Q. Now, you say that Mr. Casey received a certain amount of money; tell me again the amount of money he received?

A. I understood from Mr. Casey that he received forty thousand dollars in cash—a little over forty thousand about the 29th of April or the 30th of April before we went to Montana and at that time I found out in Montana that he received a ten thousand dollar note signed by Mr. Adams and Simanton and while I was in Montana he received a check for \$16,800 and a two thousand dollar note from Adams alone.



(Testimony of William Cullen.)

Q. He received all this from Adams?

A. No, he didn't receive it all from Adams.

Q. Did you know that he had a chattel mortgage——

A. ——He received it from the same people I received the money from, for the people we represented.

Q. Did you know that Mr. Casey had a chattel mortgage on machinery to him from the Anderson Brothers, in the principal [48] sum of \$36,000.00; did you know that?

A. I thought it was for \$26,000.00 but I knew he had a second mortgage on the machinery.

Q. Did you know that a corporation he owned controlling stock in, the Wyoming Mineral Products Company had the contract for all the fertilizer produced by the Sulphur Springs Gypsum Company for the entire United States?

A. I knew he had a contract to sell the sulphate.

Q. And that his contract covered the United States?

A. I knew that he covered all but a small portion.

Q. Did you know that he had books of account, advertising matter and other records pertaining to sales of this product that was involved in this transaction that he was required to turn over to the purchasers of the Sulphur Springs Gypsum Company?

A. Yes, I knew that.

Q. Did you know in order to get this transac-

(Testimony of William Cullen.)

tion through so that your clients could be benefited he had to part with all this evidence of security and property and take in exchange therefor, notes, which even today have not been paid?

A. I didn't know that he had not been paid, but I knew that he did that.

Q. How much of this do you think he had to take in notes?

A. \$12,000.00; I only know what he told me on that subject. [49]

Q. Mr. Casey occupied a substantially different position than the remainder of the signers of exhibit 5. They were small stockholders?

A. Some were stockholders, some had royalty assignments. I would say everyone was in a little different position than everyone else.

Q. Mr. Keinholtz had a claim for \$17,500.00 for stock he bought?

A. Some was stock and some money he advanced to Adams.

Q. How much was stock and how much was money advanced.

Mr. Hawkins: I object to this as immaterial.

The Court: I was wondering what the materiality of it was.

Mr. Young: It goes to the reasonableness of the statement of the witness that Casey agreed to pay thousands of dollars in attorneys fees.

The Court: I cannot see the materiality of it any more than work for any other clients they might have had. I have permitted a very wide

(Testimony of William Cullen.)

latitude as to the amount of work done. I cannot see that it is material but you may go ahead.

Q. Essentially the other claimants you represented, their claims represented stock they had in the Sulphur Springs Gypsum Company, and the agreement that if they were not satisfied they would have their money returned with six per cent interest? [50]

A. Yes, either in the Company or advanced to Adams.

Q. You were unable to look over the C P A audit and say what legal work or services were required?

Mr. Hawkins: That is going back to the work paid for.

The Court: When he asked about the five hundred dollars paid I didn't think it was material, I think the fact that he may have been paid five hundred dollars is entirely immaterial; I think the only question here is whether Mr. Casey owes the plaintiffs anything. However, the jury is here to pass on this. You may go ahead.

Q. Now, Mr. Cullen did you prepare any opinion or submit any opinion on the examination of this audit. A. Yes sir, orally.

Q. An oral opinion? A. Yes sir.

Q. You have never billed Mr. Casey for any sum of money for attorneys fees?

A. No sir.

Q. You have never written any letter stating

(Testimony of William Cullen.)

that you owe us a certain amount of money as attorneys fees arising out of the Sulphur Springs Gypsum Company matter or anything like that?

A. I have never written him at all.

Q. He never agreed to pay you any money? [51]

A. Yes, he agreed to pay us.

Q. The agreement that you rely upon is some statement that he made in Billings, Montana, "I will pay you several thousand dollars"?

A. That's right, he repeated that.

Q. When he got back he said he would pay you several thousand dollars. Do you know how many thousand he was going to pay you?

A. No, we were to see about that when he came in.

Q. Did you have in mind how many thousand he owed you?

A. I had in mind negotiating to see what was reasonable.

Mr. Young: I think that is all.

#### Redirect Examination

By Mr. Hawkins:

Q. About the 6th of March 1948 there being present Mr. Etter, Mr. Keinholz, Mr. Casey, Mr. Davis, Mr. Busch and yourself, were these four men, Mr. Keinholz, Mr. Busch, Mr. Casey and Mr. Davis, advised that you could no longer proceed in the name of the corporation on behalf of their interests? A. Yes sir.

(Testimony of William Cullen.)

Mr. Young: We object to that as repetition.

The Court: He has answered and the answer may stand.

Q. After you so advised them, did you advise them that you would be willing to appear for them individually from [52] that point on?

A. Yes sir.

Q. Did they agree to that representation, each and every one of them?

Mr. Young: He can say what was said and done, but not his opinion.

The Court: I think that is right.

A. We told them that they would have to proceed as individuals if they wanted to collect back the money they had given to Adams or put in the corporation. We asked each one if it was agreeable and each one of them said "yes".

Q. You said it was necessary to stand the expenses necessary?

A. We told them we would charge them individually from that time on.

Q. Was that in this conversation?

Mr. Young: We object to this, it antedates exhibit 5.

The Court: Objection overruled.

A. Yes, it was.

Mr. Hawkins. That is all.

Mr. Young: Nothing further.



## R. MAX ETTER

Called as a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Hawkins: [53]

Q. Where do you reside Mr. Etter?

A. I reside in Spokane, Washington.

Q. Are you a licensed practicing attorney?

A. Yes sir, for thirteen years I have been.

Q. Have you continuously followed your profession during that period?

A. Yes, with the exception of two years in the United States Navy.

Q. What official public positions have you held?

A. I was assistant prosecutor in Spokane County and——

Q. ——How long in that capacity?

A. One and a half years.

Q. Now, any other office?

A. I was appointed Assistant United States District Attorney for the Eastern District of Washington.

Q. And were you in the Attorney General's office?

A. I was assistant attorney general and on three occasions appointed as special State prosecutor.

Q. Did you ever have any experience with matters involving stock fraud cases?

A. Yes, I was assigned as states attorney to license violations and stock irregularities and viola-

(Testimony of E. Max Etter)

tions and the work of the S E C and mail fraud cases. I was likewise assigned to banking embezzlement transactions and cases having to do with that. [54]

Q. Did you become acquainted with the practice before the Securities and Exchange Commission?

A. Yes, a great deal more than one in the ordinary practice of law.

Q. When did you go back to private practice?

A. I was in private practice prior to the time I was in the prosecutor's office and since then for the past three years.

Q. Have you handled many matters in civil capacity?      A. Yes, sir.

Q. Such matters as we have mentioned?

A. Yes, sir.

Q. Did you confer with the Securities and Exchange Commission representative on this case?

A. Yes, sir, both in Spokane and in Seattle.

Q. You made a trip to Seattle for that purpose?

A. Yes, sir.

Q. And conferred with the S E C office there?

A. Yes, sir.

Q. What is the name of the man in Spokane representing the Commission?

A. Mr. Denny is there a good deal of the time and Mr. Stocking in Seattle.

Q. Did you go over the books of this corporation?      A. Yes, sir. [55]

(Testimony of E. Max Etter)

Q. Studied the royalty contracts referred to?

A. Yes, sir.

Q. You know Mr. Casey? A. Yes, sir.

Q. Do you recall him coming to your office in connection with this case? A. Yes, I do.

Q. In the first instance he came in what capacity?

A. The first time I heard of this was by telephone from Mr. Myers, he worked in Mr. Casey's office as I understood Mr. Casey. The next time I think I talked to Mr. Casey it had reference to a request for my attendance in the Spokane Hotel of a meeting of this Board.

Q. Did you attend that meeting?

A. I did not.

Q. You asked Mr. Cullen to attend, did you?

A. I did.

Q. Did you talk to Mr. Casey later?

A. I did.

Q. Was he there as a director of the corporation or an individual?

Mr. Young: Objected to as calling for a conclusion.

The Court: He may answer if he knows.

A. Mr. Casey, Mr. Busch, Mr. Davis and Mr. Keinholz talked [56] to me and Mr. Cullen in my office as a Board of Directors of the Sulphur Springs Gypsum Company and so stated.

Q. Did you do some work for that Board of Directors? A. Yes, sir.

(Testimony of E. Max Etter)

Q. On termination of that work did you have any conference relative to private employment?

A. Yes, sir.

Q. Relate the conversation,—what transpired?

A. After Mr. Cullen and I had made a study of the corporate records and the audit we conferred with these gentlemen and at that time advised them of suggested procedure and we likewise advised them that these were our suggested procedures on behalf of the corporation and in the event they did not see fit to proceed with the corporate organization they would not be able to act as directors for the recovery of the individual sums which they represented to us were advanced for stock and loans and royalties, we advised them that there would be a violation of fiduciary capacity and in our opinion if they wished to do so they would have to proceed in individual capacities and we asked them if they agreed to employ us for that purpose.

Q. What was their reply?

A. After explaining it to those men as well as I remember I asked each one directly if they wished to proceed in that manner. [57]

Q. In what manner?

A. To employ us as attorneys in their personal capacity to recover their money.

Q. Was Mr. Casey present? A. Yes, sir.

Q. Did you ask him if he wanted to proceed on that basis? A. Yes, sir, each one of them.

Q. What was Mr. Casey's reply?

(Testimony of E. Max Etter)

A. He said he did.

Q. Was there any statement about compensation?

A. The statement was that the compensation that was to be paid would have to be paid by individuals.

Q. No signed contract was made?

A. No, sir.

Q. When was that with reference to this exhibit number 5?

A. Prior to that, about three weeks I would say, or maybe two weeks.

Q. Was that the conference that Mr. Cullen testified to that Mr. Casey, Keinholz, Davis and Busch were present? A. I assume that is correct.

Q. Was it the same one?

A. That's right, it was the same.

Q. You were at one such conference?

A. Yes, sir.

Q. You heard all Mr. Cullen's testimony concerning the writing [58] of certain letters and preparing certain documents? A. I did.

Q. Was his testimony substantially correct?

A. I would say so.

Q. Do you recall many conferences with Mr. Casey and his associates? A. A great many.

Q. Have all the letters written in connection with this been offered here?

A. No, I recall a letter brought in to me.

Q. Mr. Etter, handing you plaintiffs' exhibit 10, marked for identification, state what it is?



(Testimony of E. Max Etter)

A. That is a letter with a number of alterations in my handwriting which was brought in, typed by Mr. Cullen.

Q. The letterhead is Mr. Casey's company?

A. Yes, he brought in several sheets.

Q. Did you redraft and write another letter?

A. Yes, I did.

Q. Was that letter sent?                      A. Yes, sir.

Q. Did Mr. Casey express any concern about this matter?

A. He came in and told me that Mr. Adams was to make an appearance in California before the Adult Probation Department in the County of Alameda and he told me it was in connection with the matter previously discussed in [59] our office concerning a lease given by The Sulphur Springs Gypsum Company, or taken by them from some people in Wyoming and provided for payment by the lessees over to the lessors,—he said that this arrangement had been made by Mr. Adams and that the royalties,—that the lease provided for fifty cent royalty to Irving Liner and that Liner was to collect the royalties and pay to the Probation Department \$23,500.00 that Mr. Adams had incurred down there. He told me that Mr. Adams was on the way to California and that he desired Mr. Casey to send this letter and fifteen hundred dollars to the Probation Department in as much as he was to make this appearance; I advised Mr. Casey that the Board had previously told us that they had refused

(Testimony of E. Max Etter)

to recognize any payment under this particular obligation. Mr. Casey was concerned but didn't want to send any money on the ground that there had been a repudiation and the Board did not wish to confirm any arrangement made but we wanted to do something so that Mr. Adams could stay out,—this was Casey's idea, and I suggested that any letter written should be written by him individually and that any money should be sent by him or his company rather than the Sulphur Springs Gypsum Company and that I thought five hundred dollars would relieve any immediate necessity and if the deal went through Mr. [60] Adams could handle it and I therefore drafted this letter in a fashion I thought was necessary and forwarded it.

Q. Did the five hundred dollars go forward?

A. Yes.

Q. With this?

A. Yes and Mr. Casey brought this to our office.

Mr. Young: Did you offer that in evidence?

Mr. Hawkins: I offer it.

Mr. Young: No objection.

The Court: It may be admitted.

Q. Did you ever discuss with Mr. Casey the moneys collected,—strike that,—did you ever discuss with Mr. Casey, or did he ever say anything about the payment to be made to you or to the firm of Cullen and Etter?

A. Yes, sir, I talked to him once at that time,—I cannot recall whether it was before or after he

(Testimony of E. Max Etter)

had gone on a trip to California, I don't recall now whether it was before or after.

Q. Was it about the collection of this money?

A. Yes, sir.

Q. And was it after the collection had been made?

A. Yes, sir.

Q. What was the substance of that conversation?

A. I called Mr. Casey and asked if he was coming to our office to discuss the matter of an adjustment or compromise [61] of fees, and Mr. Casey said he had his money tied up in sacks or something like that, and as soon as he could he was coming down and settle with us.

Q. Did he say he was coming down and settle the fee with you?

A. He did say that, yes, sir.

Q. Mr. Etter, you were connected with this matter from some time in February until April or May?

A. Yes, sir.

Q. And familiar with all the steps and things done by your law firm?

A. I am familiar with that, although I didn't do all of this myself.

Q. Based upon your experience in cases of this kind and the work done and the results obtained and your special qualifications, can you express an opinion as to the reasonable value of the services rendered?

A. Yes, sir.

Q. What is that opinion?

A. I would say that the reasonable value of the service rendered is \$15,000.00.

(Testimony of E. Max Etter)

Q. What elements do you take into consideration?

A. I take into consideration principally the full amount of the recovery, with my experience in cases of this kind, this is the first time that I have ever seen recovery on a case of this kind. [62]

Mr. Young: We object to this; it is not responsive.

The Court: It is one of the factors he bases his opinion on. I think the last part of the answer may be stricken, that he had never seen recovery in this kind of case.

Q. How much money was recovered on behalf of your clients?

A. As I understand a hundred per cent recovery of all their money was made.

Q. Some interest?

A. Yes, sir, and some interest as I understand it.

Q. Mr. Casey represented to you,—what did Mr. Casey represent was the amount coming to him, in your office, Mr. Etter?

A. Mr. Casey represented to us that he had somewhere in the neighborhood of \$69,500.00 but he could not confirm that as the final amount until he went to Thermopolis, Wyoming, and discussed a second mortgage and other factors including his dealerships.

Q. As to the amount collected how much was Mr. Casey's?

(Testimony of E. Max Etter)

Mr. Young: We object to that. It is immaterial.

The Court: I think the percentage is immaterial.

Q. How much did you collect for Casey, do you know? [63]

A. I don't know except what I have been told by Mr. Cullen.

Q. What he testified to?

A. That is correct.

Mr. Hawkins: That is all, you may inquire.

#### Cross-Examination

By Mr. Young:

Q. Your first discussion of services to be rendered in connection with the preparation of the contract exhibit 5, you say, was had about two weeks prior to the date of the preparation of the contract?

A. I think so.

Q. At that time you had a verbal agreement as to what you would do by way of preparing a contract and what you would charge for the preparation of the contract?

A. A verbal agreement to do all steps necessary.

Q. Exhibit fourteen marked for identification, I will ask you if that is a statement on your statement form?

Mr. Hawkins: Hand it to him and ask what it is?

Q. What is it?

A. It appears to be a billing from our office.

Mr. Young: I offer it in evidence.

Mr. Hawkins: No objection except that it goes to



(Testimony of E. Max Etter)

the services for the Sulphur Springs Gypsum Company. [64]

The Court: I don't think it is material but we have had so much of it we might as well put this in too.

Mr. Young: This is on a form of Cullen & Etter, attorneys at law, 726 Paulsen Building, Spokane 8, Washington. Dated March 10, 1948. To Sulphur Springs Gypsum Company, East 3044 Trent Avenue, Spokane, Washington. Retainer for services, per verbal Statement, agreed 3/6/48 \$500.00. Pd 3/16/48.

Mr. Hawkins: That is not all that states, it states it was paid March 16, 1948.

Mr. Young: I read, "paid -pd- 3/16/48.

Q. The initial Board of Directors of the Sulphur Springs Gypsum Company that you dealt with comprised the new Board?

A. That is correct.

Q. That Board was interested in working out a solution of the problem which it had with Mr. Adams who owned the controlling interest in that corporation?

A. There were numerous problems.

Q. That was the primary problem?

A. Mr. Adams was, yes, that is correct.

Q. It was thought that Mr. Adams should be approached to secure from him a trust agreement involving his stock so that it would be tied up in such a way that activity [65] of the new Board would not be hampered with?

(Testimony of E. Max Etter)

A. That is correct, that is part of it.

Q. Mr. Adams was brought to your office?

A. Are you referring to the time of the work for the Sulphur Springs Gypsum Company?

Q. Chronologically, the work that led up to exhibit 5?

A. That is substantially correct.

Q. Mr. Adams refused to enter into a voting trust agreement but he made the Board of Directors of the Sulphur Springs Gypsum Company a proposition whereby he would secure a buyer for their stock and their claims provided they would agree as to the amount of their claims and give him six months in which to do it?

A. Mr. Adams didn't make the proposition.

Q. Who did?

A. We made the proposition to Mr. Adams.

Q. Mr. Adams agreed to put up as security,—good faith security fifty thousand shares of the stock of the Sulphur Springs Gypsum Company?

A. He agreed to do that, yes.

Q. On the other hand the people that had claims including members of the Board of Directors agreed as to the amount of their claims?

A. Yes, and Mr. Adams agreed to other things.

Q. That is correct to this point?

A. That is right. [66]

Q. Now, in addition, Mr. Adams either willingly or was forced to agree to pay attorneys' fee?

A. I don't recall that Mr. Adams was forced to pay attorneys' fee.

(Testimony of E. Max Etter)

Q. He agreed to pay attorneys' fee as a part of this contract?

A. The language indicates that.

Q. Mr. Etter, according to exhibit 5, Mr. Adams had six months to perform his part of the contract?

A. That is correct.

Q. Do you recall when the discussion of attorneys' fee came up Mr. Adams made a special point of that, asking what you would demand by way of attorneys' fees and you and Mr. Cullen excused yourselves and came back and told him what you would expect as attorneys' fees?

A. I don't recall that.

Q. You don't recall that?

A. I certainly do not.

Q. Each of the parties that signed exhibit 5, which is the final contract, agreed to turn in to your office all evidence of indebtedness that they had or claimed by way of stock or notes or whatever they had by way of indebtedness?

A. That is right.

Q. In paragraph six, I think, of the agreement?

A. Yes, sir. [67]

Q. Mr. Casey didn't turn in stock or claims of indebtedness? A. No, sir, he didn't.

Q. It was specifically understood by all those who entered into this agreement, exhibit 5 as follows: "That this agreement shall be binding on each and every individual who signs the same, to the full extent of his obligation undertaken under

(Testimony of E. Max Etter)

the terms of this agreement, and no other.” That is your language?      A. Yes, that is correct.

Q. You realized that you had to have a contract running to these people as individuals; you wanted to be sure that you had a contract that would cover your fees in handling matters of their claims ultimately under the terms of the contract?

A. I don’t think that is correct. The contract was between our clients and Mr. Adams, we didn’t represent Mr. Adams at any time.

Q. The people that you were representing were not to be bound by the contract unless they signed it?      A. What was that again, Mr. Young.

Q. That no one was to be bound by this contract unless they signed it?

A. The intent was to get Mr. Adams’ signature; that was the express request made by all these people.

Q. Mr. Adams did sign the contract? [68]

A. Yes, sir.

Q. He returned it to your office?

A. Yes, sir. I think he signed it in our office in the presence of his counsel, although I might be mistaken in that.

Q. Was Mr. Casey present when he signed the contract?      A. I don’t recall.

Q. You were informed by Mr. Adams that Casey wouldn’t sign the contract?

A. No, sir, he didn’t inform me that he wouldn’t sign.

(Testimony of E. Max Etter)

Q. Didn't Mr. Adams inform you that Casey wouldn't sign the contract?

A. He had some discussion with Mr. Cullen but he didn't inform me.

Q. Have you been informed by Mr. Cullen that Mr. Adams told him that Casey wouldn't sign the contract?

A. No, I never was informed that he wouldn't.

Q. You never got Mr. Casey's signature on the contract?

A. We never requested it, Mr. Young.

Q. Calling your attention to exhibit 6, you received, some time in April, that exhibit, did you not?

A. Mr. Cullen received it, I have seen it in the office.

Q. You knew at that time, when you received that exhibit that Mr. Casey was dealing individually with Mr. Adams and the other people involved in this transaction?

A. I did not know it. I didn't understand it as such. Mr. [69] Casey was in our office many, many times after we received this.

Q. Did you ever hear he was proceeding individually without consulting you?

A. I didn't discuss it with Mr. Casey.

Q. Did any member of your firm discuss it with Casey?

A. I think Mr. Cullen discussed it with Mr. Casey.



(Testimony of E. Max Etter)

Q. Did you get the impression that Mr. Casey was handling his matters individually without regard to any contract you had?

A. No, absolutely not.

Mr. Young: This is exhibit 6. "March 23, 1948. To Whom It May Concern,—L. W. L. Casey, representing myself to be the principal owner of the Wyoming Mineral Products Co., a corporation of the State of Washington, for the consideration of One Dollar receipt of which is hereby acknowledged, do hereby agree to sell to H. J. Adams, his heirs or assigns, all personal and corporation claims against the Sulphur Springs Gypsum Company, a corporation of the State of Wyoming and all personal or corporation claims against H. J. Adams, for the sum of Fifty-two thousand dollars, together with interest at the rate of six per cent from March 23, 1948, the payment of this sum of money to be made within six months from date hereof, otherwise [70] this agreement shall be null and void.

"The sum mentioned above shall be in full payment of any and all obligations given to me heretofore by the Sulphur Springs Gypsum Company of Thermopolis, Wyoming, H. J. Adams, of Spokane, Washington, and Anderson Brothers Contractors, of Thermopolis, Wyoming, and shall include a certain note of face value of \$15,000.00 issued to W. L. Casey and C. W. King by the Sulphur Springs Gypsum Company of Thermopolis,

(Testimony of E. Max Etter)

Wyoming, a certain assignment of fifty cents per ton, issued by Anderson Brothers, Contractors, a certain second mortgage issued by Anderson Brothers, Contractors, of Thermopolis, Wyoming, in the sum of \$26,000.00 more or less; also the business goodwill, contracts and assignments of the Wyoming Mineral Products Company, of Spokane, Washington.

“It is mutually understood that contracts now in effect with agents and representatives of the Wyoming Mineral Products Company, shall be honored in full by H. J. Adams, his heirs or assigns.

“W. L. Casey further agrees to surrender 26,000 shares of stock in the Sulphur Springs Gypsum Company.

“It is also understood that W. L. Casey is to be paid for material and equipment purchased for the operation of marketing soil sulphate subsequent to this date in addition to the purchase price hereinabove mentioned.” [71] That is signed W. L. Casey, Wyoming Mineral Products Company, Inc., by W. L. Casey and witnessed by C. W. King of Bonners Ferry, Idaho.

Q. When that agreement was called to your attention you knew that Mr. Casey was acting individually in the matter of protecting his interest and making his transaction with Mr. Adams for all of the subject matter involved in this contract exhibit 5?

A. No. I might offer further explanation: When

(Testimony of E. Max Etter)

Mr. Casey—when it was decided that this transaction would be closed in Montana it was suggested by Mr. Busch that the different instruments and articles that were held by Cullen and I should be sent to Montana, Mr. Casey protested and insisted that I go to Montana; he wanted me to go; he wanted to be sure that he got everything he had coming; he was dealing with certain people that some called rather shrewd. I was unable to go because of other business that kept me here and Mr. Cullen went over.

Q. Mr. Casey had made his contract with Adams sometime in the fore part of April, 1948?

A. I don't know what he had done with Mr. Adams.

Q. This exhibit 6 is dated the 23rd of March, 1948?

A. That's right. It has been testified to here that it was actually entered into around the 5th of April, 1948. That [72] is correct, it is dated the same day as the master contract.

Q. Now, Mr. Casey had entered into his contract with Mr. Adams, this exhibit 6?

A. I don't know what he had to do with Mr. Adams separately.

Q. When you received that around the first of April you knew that Mr. Casey was dealing individually with Mr. Adams?

A. We did not, and were not so informed.

Q. Take the combination of the two things,—Mr. Casey's refusal to sign—

(Testimony of E. Max Etter)

A. —Mr. Casey didn't refuse to sign.

Q. Well, his failure to sign and this exhibit coming to your attention that he was dealing directly with Mr. Adams, didn't it occur to you that you should take it up with Mr. Casey and see if you should have a right to contract his business?

A. It didn't occur to me at all.

Q. It didn't occur to you at all?

A. No, sir, it didn't.

Q. You had nothing to do with the preparation of exhibit 6?      A. No, sir.

Mr. Young: That is all.

### Redirect Examination

By Mr. Hawkins:

Q. Referring to this exhibit, does it bear the signature of Mr. Adams?

A. No, it doesn't.

Q. The only signature it bears is what?

A. Mr. Casey's, and witnessed by another gentleman.

Q. It is signed by him individually and in his capacity in the Wyoming Mineral Products Company?      A. That is correct.

Q. Did you consider yourself as attorney for Mr. Casey throughout all these proceedings?

Mr. Young: We object to what he considered himself, it would be a conclusion.

The Court: It may be a conclusion, but I think generally an attorney knows whether he is attorney for a person, just as a Doctor must know

(Testimony of E. Max Etter)

whether he is a person's physician, but I don't know how you would get that in evidence.

Q. There was some reference to exhibit 8 which Mr. Cullen said was not sent out, you are familiar with that?

A. Yes, sir.

Q. Do you know why it wasn't sent out?

A. Yes, sir.

Q. Why?

A. Mr. Casey requested us not to send it, he didn't want to interfere with these proceedings, they were nearing conclusion.

Q. Were you ever employed by Mr. Adams? [74]

A. No sir.

Q. Was he ever a client of yours?

A. Never was, no, he never has been.

Q. Was he obliged to pay you?

A. I don't know anything about it if he ever has.

Q. My question was—was he obliged to?

A. No sir.

Mr. Hawkins: That's all.

### Recross Examination

By Mr. Young:

Q. What do you mean by the language of this contract, "the said party of the first part", that is Mr. Adams?

A. That is correct.

Q. "The said party of the first part does also agree that the law firm of Cullen and Etter, 726 Paulsen Building, Spokane, Washington, shall represent and shall perform all such services as may



(Testimony of E. Max Etter)

be necessary in the effectuation of any part of this agreement relative to the settlement thereof by the part is of the second part and relative to the operating during the period so specified herein of the Sulphur Springs Gypsum Company; and said attorneys may accept in trust, if offered, other claims for payment by said party of the first part, including shares of stock in the said Sulphur Springs Gypsum Company, notes signed by the company or the first party, or other evidences of [75] indebtedness so signed; and the first party does hereby agree that the services of such named attorneys shall be a legitimate claim which shall be paid at the time set for performance for the payment of claims herein by the party of the first part; and it is likewise agreed by said party of the first part that such claims shall be entitled to payment to the extent of not less than \$4,000.00 subject to such revision as may be necessary for work done by said attorneys which is not now contemplated by this agreement.”

What do you mean that you had no agreement, I understood you to say you had no agreement,—what do you mean when you say you had no agreement with Mr. Adams for attorneys fees when in paragraph 12 you agree with him and name the amount.

A. Do you want me to explain it?

Q. I am not asking for any explanation, it is right there.

The Court: You may explain.

(Testimony of E. Max Etter)

A. We drew three drafts of this contract in which no reference was made to such a thing. Mr. Huntington came and said he had a substantial claim, that he had performed services in the amount of thirty-five hundred dollars and had other work to do and that he thought he would be entitled to have and insisted that the Company or the contracting parties accept the obligation. Our clients refused to do that, and after a discussion in our office,—I think Mr. Casey was there,—I know it included two or three directors and was over a period of a couple of hours, and our people refused that demand. Mr. Cullen suggested that some clause be put in, that the clause be inserted and that it be four thousand dollars against whatever might occur.

Q. But the contract does provide for attorneys fees?

A. Yes sir.

Q. There is no question about that?

A. No, there isn't.

Mr. Young: That is all.

Mr. Hawkins: That is all.

The Court: We will recess for ten minutes at this time.

November 23, 1948, 3:30 P.M.

## FRANK H. DAVIS

Called as a witness on the part of the plaintiffs after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Hawkins:

Q. Your name is Frank H. Davis?

A. Yes sir.

Q. Where do you reside?

A. Spokane, Washington.

Q. What is your occupation? [77]

A. Hay, grain and feed.

Q. Are you the Mr. Davis referred to in the testimony in this case? A. Yes sir.

Q. Referring to a time after Cullen and Etter had examined the books and the audit do you recall that they made a report to you? A. Yes sir.

Q. Were you a director of the Sulphur Springs Gypsum Company. A. Yes sir.

Q. Where were you when you received this report from Cullen and Etter?

A. In their office.

Q. Who else was present?

A. The rest of the Directors.

Q. Was Mr. Casey present?

A. All the Directors except one?

Q. Was Mr. Casey there?

A. Yes sir.

Q. Mr. Keinholz? A. Yes sir.

Q. Mr. Busch? A. Yes sir.

Q. And yourself? A. Yes sir. [78]

Q. After they made their report to you con-

(Testimony of Frank H. Davis.)

cerning the affairs of the corporation do you recall what conversation followed?

A. They told us we would have to proceed as individuals.

Q. That you would have to proceed as individuals?      A. Yes sir.

Q. And not as directors of the corporation?

A. Yes sir, that's right.

Q. Were you asked if that was agreeable?

A. Yes sir.

Q. Who asked you that?      A. Mr. Etter.

Q. What was your reply?

A. That it was agreeable.

Q. Did he ask Mr. Casey?      A. Everybody.

Q. And what were their replies?

A. That it was agreeable with everybody.

Q. Was anything said about who would have to pay for the services?

A. That we would have to pay individually. We were hiring them individually.

Q. Did that relationship continue down to the time you collected the balance of your money?

A. Yes sir. [79]

Mr. Hawkins: That is all, you may examine.

#### Cross Examination

By Mr. Young:

Q. Was it discussed that the contract would be drawn covering the fee arrangement?

A. No, we said it would be taken out individually and not as a group.

(Testimony of Frank H. Davis.)

Q. So that those who wanted to enter into the contract could and those who didn't, didn't need to enter into the contract?

A. We were all to stand as one.

Q. Was there a written contract at that time?

A. No sir.

Q. The written contract was prepared later?

A. I don't remember of any, I don't know which contract you mean?

Mr. Hawkins: I object to the cross examination as improper, it is not within the scope of the direct examination of this witness.

The Court: Sustained.

Q. Was there any,—

The Court: —Just a minute Mr. Young. This contract is really not before this Court as a contract, on the objection of counsel I admitted it in a limited way. I sustained counsel for the defendant [80] and the admission of this contract was only for the purpose of showing the amount of work involved here by these plaintiffs. There has been a lot of evidence here without objection, but this contract is in here only to show the amount of work and it has no effect whatever except to show the amount of work.

Q. Was there any discussion as to the amount of compensation for those services?

A. No sir.

Q. You didn't know whether it would cost one dollar or a hundred dollars?      A. We did not.



(Testimony of Frank H. Davis.)

Q. What were the services to consist of?

A. Recovering our money.

Q. How was that to be done?

A. I wouldn't know. That was our lawyer's work.

Q. Was there a discussion of attorneys fees in your presence?      A. No sir.

Q. Was Mr. Adams present during the discussion?      A. Yes sir.

Q. Was Mr. Adams present during this discussion that you had with the attorneys,—you know Mr. Adams?      A. Yes sir, I do.

Q. Was he present?      A. Most of the time.

Q. You don't recall any discussion about fees?

A. No sir.

Q. Fees could have been discussed and you would not remember it, you think?

A. I think not, I remember pretty well.

Q. There wasn't any reference to a four thousand dollar fee to be paid by Mr. Adams.

A. No sir.

Q. Or anyone in the group?      A. No.

Q. Did anyone there appear to be interested as to what the cost of the service was to be?

Mr. Hawkins: We object to the form of that question.

The Court: The question should be as to what was said.

Q. Did anyone in the group say anything with respect to attorneys fees or what the cost of the service was to be?      A. Nobody, at any time.

(Testimony of Frank H. Davis.)

Q. No one made any expression?

A. I just wondered about it.

Q. Do you know of any other individual who wondered what the fee was to be?

A. Yes sir, me. [82]

Q. Yes, I understand, but you didn't make inquiry about it.

A. No.

Q. What did you hear,—strike that please,—you didn't hear anyone else make any inquiry?

A. No sir.

Q. Were you present when Mr. Adams made a contract, or agreed to deliver fifty thousand shares of stock as good faith performance bond?

Mr. Hawkins: We object, it is beyond the scope of the direct examination.

The Court: Yes, unless you desire to make him your witness?

A. I don't desire to do that.

Q. Did you leave the office of Cullen and Etter ahead of the other members of the Board of Directors of the Sulphur Springs Gypsum Company?

A. No sir.

Q. You were there during all of the time?

A. Yes sir.

Q. Did you attend other meetings that Mr. Adams was at with the Board of Directors in the office of Cullen and Etter?

Mr. Hawkins: Objected to as beyond the scope of the direct examination.

The Court: Sustained. [83]

(Testimony of Frank H. Davis.)

Mr. Young: I will make him my witness for this one question.

The Court: We will wait until you put on your case in chief, if you desire to make him your witness you may call him then.

Mr. Young: I cannot proceed further on this because of this question.

The Court: Do you have further redirect.

### Redirect Examination

By Mr. Hawkins:

Q. Was Mr. Adams present at the time of this conversation which you mentioned at which Mr. Davis, or rather Mr Casey, Mr. Keinholz, Mr. Bush and yourself were present, this was a conversation about employing Cullen and Etter individually, you mentioned Mr. Casey, Mr. Keinholz, Mr. Busch and yourself,—was Mr. Adams there at that time?

A. Yes sir.

Q. He heard this conversation regarding the employing of Cullen and Etter?

A. Yes sir.

Mr. Hawkins: That is all.

Mr. Young: That is all.

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### ALBERT KEINHOLZ

Called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Hawkins:

Q. Where do you reside Mr. Keinholz?

A. Spokane, Washington.

(Testimony of Alfred Keinholz.)

Q. What is your occupation?

A. Farming.

Q. Referring now to a conversation occurring in the office of Cullen and Etter in Spokane, Washington, when you were advised and given a report by Cullen and Etter as to the result of an examination of the books and audit of the Sulphur Springs Gypsum Company, do you recall that time Mr. Keinholz?

A. Yes sir.

Q. Do you recall who was present at the time?

A. I think all the directors were present.

Q. You mean Mr. Busch, Mr. Casey, yourself and Mr. Davis.

A. That's right.

Q. After Cullen and Etter gave you their report what did they say about further representation?

A. Well, that it was a matter of individuals then, that we would act as individuals to get our money back.

Q. Were you to pay them?

A. We couldn't pay them any other way because we sent all the money the corporation had with the books so it was [85] individually.

Q. Have you discussed this matter of fees with Mr. Casey?

A. Yes sir.

Q. When and where?

A. Spokane.

Q. When with respect to the conversation you just testified to?

A. I think it was after he had his and we didn't get ours.

Q. After he had gotten his money in Montana?

(Testimony of Alfred Keinholz.)

A. It was concerning the settlement for which we were to pay, the fee we were to pay.

Q. What was the conversation?

A. He asked me to state that you fellows agreed to take Fifteen hundred dollars.

Q. He asked you to say that Cullen and Etter had agreed to take Fifteen hundred dollars?

A. Yes sir.

Q. What did you say?

A. I didn't understand it that way nor would I do business that way.

Q. Did he say anything further to you?

A. No, that cleared up the whole thing.

Mr. Hawkins: That is all, you may examine.

### Cross Examination

By Mr. Young:

Q. Where did this take place? [86]

A. In the corridor of the Paulsen building and the office of the Wyoming Mineral Products Company at Trent.

Q. Who was present at this conversation?

A. Myself and Casey.

Q. Isn't this what was said? Mr. Casey said his understanding of the contract entered into with the firm of Cullen and Etter provided for payment of Two thousand dollars if Adams performed the contract within sixty days and that they would not be entitled to any attorneys fee other than provided in the contract?

A. I don't remember it that way.



(Testimony of Alfred Keinholz.)

Q. Could that not have been the thing that Casey was talking to you about?

A. I presume that it could be, but I don't remember it that way at all.

Q. For the purpose of refreshing your recollection further didn't Mr. Casey point out to you that the contract you signed with Mr. Adams provided for a limitation of attorneys fees and that you should not pay more than what was provided for in the contract, he pointed that out to you did he not?

A. That was just a few days ago, but not at that time.

Q. Didn't he, or could he not have, at the time he talked to you the first time, have called your attention to the fact that there was a limit as to the attorneys fees that [87] were to be collected by reason of the contract you signed?

A. I have no recollection of an agreement between Cullen and Etter and myself or the Company or any individuals wherein there was an amount set on the amount to be paid these boys for the collection of our money.

Q. I am asking if it were not a fact that Mr. Casey could have been referring to the limitation on the fees that was contained in the contract that you signed with Cullen and Etter?

Mr. Hawkins: Objected to as repetition, he has answered it.

The Court: Yes, but he may answer again.

(Testimony of Alfred Keinholz.)

A. I suppose it could have been that way but I don't remember it that way at all.

Mr. Young: That is all.

Redirect Examination

By Mr. Hawkins:

Q. You had \$17,500 involved in this matter?

A. Yes sir.

Q. Did you get it back?                      A. Yes sir.

Mr. Hawkins: That is all.

Recross Examination

By Mr. Young:

Q. And you paid three per cent—— [88]

Mr. Hawkins: Objected it is not proper cross-examination, it is not within the scope of the direct.

The Court: Sustained.

Mr. Young: That is all.

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EDWARD J. LEHAN

Called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Hawkins:

Q. Where do you reside?

A. Spokane, Washington.

Q. Your profession or occupation?

A. I am a lawyer.

Q. How long have you been a lawyer?

A. Graduated June 1935 and admitted in September of that year.

(Testimony of Edward J. Lehan.)

Q. Been practicing continuously since that time?

A. With three and a half years out for the service.

Q. Are you acquainted with the law firm of Cullen and Etter?           A. Yes sir.

Q. Your firm is of comparable size?

A. Yes sir.

Q. Comparable with them in style of practice?

A. Yes sir.

Q. Associated with them?

A. Not in business,—I have known Mr. Cullen and Mr. Etter [89] from the time we were all in school, I was formerly Chief Civil Deputy Prosecuting Attorney Spokane County at the time Mr. Etter was employed as deputy prosecuting attorney assigned to the stock fraud cases and I also knew him in the District Attorney's office. I had no association in the Attorney General's office although I served as Assistant Attorney General and was familiar generally with the files he had handled.

Q. Are you familiar with the reputation of the law firm of Cullen and Etter?           A. Yes sir.

Q. What is its reputation?           A. Excellent.

Q. Have you been present throughout these proceedings?           A. Since Court convened.

Q. Have you heard all the testimony?

A. Yes sir.

Q. Including the testimony of Mr. Cullen and Mr. Etter?           A. Yes sir.

Q. Taking into consideration all the evidence you have heard and being familiar with the ele-

(Testimony of Edward J. Lehan.)

ments taken into consideration in arriving at a fee,—are you familiar with the elements taken into consideration in arriving at fee?      A. Yes sir.

Q. What are those elements?

A. They vary. In cases of this character the amount involved and the prospects of recovery at the outset are factors to be considered, then the time attending to conferences and work and advice. The most effective procedure for securing the desired end are factors to be considered, and in my opinion in this case——

Q. ——Mr. Lehan, would the loss of other business be an element to be considered?

A. Yes, loss of other business from devoting time to this case. The fact that a case of this kind requires immediate attention is a factor.

Q. Would the skill and reputation of the attorneys be an element for consideration?

A. Yes sir, and in that connection I am of the opinion that Mr. Etter's experience was of considerable value, and an estimation of Mr. Cullen's abilities could be summed up by saying that I think he is a capable and able lawyer.

Q. Are those all the elements?

A. No. I would consider further the practice of the Spokane County Bar Association, the community in which we practice with respect to contingent fees, it is the general practice matters taken on a contingent basis are taken in this way: twenty-five per cent of any recovery effected by correspon-

(Testimony of Edward J. Lehan.)

dence or consultation, the client to pay all necessary costs; one-third in the event it is necessary to institute civil proceedings in the Superior Court and prosecuting that to a conclusion.

Q. Are those all the factors that you took in consideration?

A. I considered the excellent results obtained in this instance.

Q. In the light of those conditions and the elements what is your opinion as to the reasonable value of the services rendered by Cullen and Etter for Mr. and Mrs. Casey.

A. The same as expressed by Cullen and Etter; that fifteen thousand dollars would be a reasonable sum in the light of the recovery and the other factors. I would qualify that if it was across the table dispute, if I were involved I would negotiate on the basis of \$12,500.00.

Q. Have you ever made any expression of opinion as to the attorneys fees involved in this action?

A. No sir.

Q. To Mr. Cullen, Mr. Etter or myself?

A. No, and not to any other individual.

Mr. Hawkins: That is all.

### Cross Examination

By Mr. Young:

Q. The matter of recovery is important to take into consideration in arriving at a contingent fee. What amount are you taking into consideration in arriving at this contingent [92] fee?



(Testimony of Edward J. Lehan.)

A. My understanding so far is that a sum approximating seventy thousand plus has been recovered for Mr. Casey.

Q. Seventy thosuand dollars plus?

A. That is right.

Q. Would you take into consideration the fact that Twenty-six thousand of that was represented by a chattel mortgage covering machinery of ample value to protect the mortgagee and act as security for the mortgagee, would you take that factor into consideration, assuming that to be a fact, would you take that into consideration in arriving at a fee?

A. It wasn't my understanding from the evidence.

Q. I am asking you to assume that as true, then that would have some bearing?

A. The fact that he accepted a chattel mortgage.

Q. Assuming that he had been secured prior to the negotiations by the plaintiffs, to the extent of twenty-six thousand dollars, that would enter into your conclusion as to a reasonable amount of the fee?

A. If I am to assume there was a chattel mortgage, I am also to assume that he was secured with a chattel mortgage.

Q. Assuming as a part of the seventy thousand dollars plus they recovered for Mr. Casey that he had, before any employment was undertaken by the plaintiffs, security for \$26,000.00 of that sum? [93]

A. I understand what you are asking.

(Testimony of Edward J. Lehan.)

Q. What effect would that have?

A. Would that be a first or second mortgage?

Q. A first mortgage.

A. I would assume if that is the case that there was ample security for the indebtedness and that consideration should be given to it.

Q. How much consideration would you give it?

A. That goes to the realm of speculation. I would want to know whether he was satisfied with his security.

Q. Assume that he was, that he had ample security.

A. And wished to collect the difference between the \$26,000.00 and the \$70,000.00?

Q. That he was required to put it up in settling his dealings with other parties——

A. ——So that the net recovery would be seventy thousand?

Q. That is right.

A. Then I would compute it on the same basis that we compute collections, twenty-five per cent without dispute.

Q. Then assume that Mr. Casey had a franchise for the sale of the product of this corporation, the business and good will, and was yielding that as a part of the consideration flowing from him to the party paying the seventy thousand dollars, would you take that into consideration in arriving at the reasonable value of the fee? [94]

A. I don't know what value those matters or rights have?

(Testimony of Edward J. Lehan.)

Q. And you would have to know that before you could arrive at an opinion as to the reasonableness of the fee?

A. My opinion was based on the evidence I heard.

Q. Assuming that in addition to surrendering the chattel mortgage covering machinery that Mr. Casey also surrendered a franchise to sell this product in the entire United States, together with the good will that he had built up over a period of time,—you would have to know the value of that business before you knew whether he actually received anything?

A. You would have to know, of course.

Q. And without that information you could not determine what a reasonable fee would be?

A. I have expressed an opinion on the evidence I heard.

Q. Assuming as a part of the transaction Mr. Casey took notes of questionable value in the sum of \$12,000.00, you would have taken that into consideration?

A. That's right.

Q. And without that information you wouldn't render an expert opinion?

A. I could assume that he would only accept notes that there was every prospect of payment on.

Q. Reasonable men have bad notes?

A. That is correct. [95]

Q. Did you examine any briefs written by the firm of Cullen and Etter?

Mr. Hawkins: Objected to as there is no testimony of briefs being prepared?

(Testimony of Edward J. Lehan.)

A. I did not.

The Court: He has answered now, and the answer may stand.

Mr. Young: That is all.

### Redirect Examination

By Mr. Hawkins:

Q. Your opinion is based on the evidence you have heard here? A. That is correct.

Mr. Hawkins: That is all.

Mr. Young: That is all.

Mr. Hawkins: The plaintiffs rest.

Mr. Young: The plaintiffs having rested, comes now the defendant Casey and Wife and move the Court for an order directing the jury to retire and bring in to Court a verdict for the defendants, or in the alternative for an order of Judgment of Non-suit. This motion is predicated upon the fact that the evidence of the plaintiffs has failed to establish a contract of employment. They have failed to establish *the* relationship of attorney and client has ever existed between the plaintiffs and the defendants. It would seem that if any such contract [96] existed it was terminated prior to the rendering of the service claimed to have been rendered by the plaintiffs; that the services claimed by the plaintiffs to have been rendered were contained in a contract prepared by them and it appears from the testimony in this case that they were paid for such services in accordance with the terms of that contract.

The Court: I am satisfied that there is sufficient

(Testimony of Edward J. Lehan.)

evidence to put the case to the jury; that there is evidence that services were performed by the plaintiffs for the defendant in connection with the matters here testified to. The motion will be overruled.

Mr. Young: I am handing my requested instructions on behalf of the defendants, and here is a copy of the brief in support of the instructions.

Mr. Hawkins: The plaintiffs file and present their requested instructions.

The Court: We will recess until morning, we will meet tomorrow morning at 10 o'clock.

November 24, 10 A.M.

(Opening statement by Mr. Young.)

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H. J. ADAMS

called as a witness on behalf of the defendants after being first duly sworn, testifies as follows: [97]

Direct Examination

By Mr. Young:

Q. State your name?

A. H. J. Adams.

Q. Where do you live?

A. Spokane, Washington.

Q. Your business or occupation?

A. Employee of the Soil Sulphate Distributing Company.

Q. Are you the Adams mentioned in this case?

A. Yes, sir.



(Testimony of H. J. Adams.)

Q. Were you the promoter of the Sulphur Springs Gypsum Company?      A. Yes, sir.

Q. Tell us about that promotion?

Mr. Hawkins: Objected to as it is not within the pleadings.

The Court: No, I don't think it is. Sustained.

Q. Do you recall being in the office of Cullen and Etter during the time that the contract was negotiated between you and certain stockholders of the Sulphur Springs Gypsum Company?

A. Yes, sir, I first met them about March 18, 1948.

Q. Where did you meet them?

A. In Mr. Etter's office—Cullen and Etter.

Q. What was said and done? [98]

A. Mr. Etter was talking,—Mr. Cullen was busy in another room with another client a good portion of that time. Mr. Etter said that they had had several meetings in connection with the Sulphur Springs Gypsum Company, which I knew nothing about; that they also had an investigator, and that he proposed for the Company that I surrender two hundred thousand shares of stock to the Directors of the corporation who would act as Trustees to use that in a voting trust for a period of two years. This I refused and I made a counter proposition; that I didn't think the directors capable to operate the Company and that I would not turn my stock over under such condition.

Q. Were you president of the corporation?

(Testimony of H. J. Adams.)

A. Vice President; I bought out the stock of the President which automatically put me in to act as president.

Q. Then this Board was a new Board?

A. That I nominated and elected.

Q. Was Mr. Casey present at that meeting?

A. Yes, sir.

Q. Was he a member of the new Board?

A. Yes, sir.

Q. Go ahead.

A. I proposed that I turn over fifty thousand shares of stock as part of earnest money, consideration; first I thought I could do all this in sixty days and then [99] I asked for six months, and if I failed to secure the money if the other men in the deal wished to get out with their money plus six per cent,—if I failed they could keep the fifty thousand shares.

Q. Who were the others you referred to?

A. Mr. Busch had sixty thousand and Mr. Davis had fifteen thousand and the other directors or anybody that had any money in the Company, including Mr. Casey.

Q. Go ahead.

A. I proposed in case I failed that I would put up two hundred thousand shares to be used for a voting trust for a period of two years; that would give the directors a chance to work it out. I didn't think, however, that they were capable to do it and didn't have any inclination to do it.

Q. What was said about Attorneys' fees?

(Testimony of H. J. Adams.)

Mr. Hawkins: As between who?

Q. As between you and the firm of attorneys and the people who were there for the purpose of contracting,—the firm of Cullen and Etter.

Mr. Hawkins: Objected to as not within the issues here. As to whether Cullen and Etter had a contract with Casey, that is fixed by the pleadings.

The Court: I think that is correct, but your objection should have come earlier; at the time of the cross-examination of the witnesses for the plaintiff. I still think this should be narrowed down to the contract [100] between Casey and these plaintiffs. I will let him go ahead. You may proceed, Mr. Young.

Q. Go ahead, Mr. Adams.

A. The first thing that was done,—they started to draft a contract; it was not to be ready until the following day. I called my attorney, Mr. Huntington, at Billings, Montana. I wanted him to check over the contract and to help Mr. Etter redraft this contract. While we were talking it over, Casey, Busch, Davis, Mr. Etter and Mr. Cullen and Mr. Keinholz were present, I told them that I had a tough experience in California in which I had sent in \$15,000 in connection with a certain settlement and the attorneys had used eight thousand of it and I wanted to know what the attorneys' fees were going to be, for the reason that I was agreeing that I would return all their money plus six per cent interest and if the attorneys' fees were

(Testimony of H. J. Adams.)

to be paid I was going to have to pay them and I wanted to know what they were. Mr. Etter and Mr. Cullen went in another room and Mr. Etter again reiterated the amount of work concerned and so forth, the conferences and contracts and such and he said Mr. Adams thinks he can get this deal through in sixty days and he says if he does we should have two thousand dollars and if it goes six months we should have four thousand. However, the contract as it was [101] drawn didn't specify two thousand dollars but said "not less than Four thousand dollars." The contract didn't mention sixty days because I guess they thought it would not go through in sixty days.

Q. You have been handed an exhibit marked exhibit 15 for identification, what is that?

A. This is the contract in which I delivered fifty thousand shares of stock which was to be——

Mr. Hawkins: ——That is a contract,—he has answered.

A. Yes, it is a contract.

Q. Does it bear your signature?

A. Yes, sir.

Q. Is that the contract you were referring to in your testimony, that was finally arrived at?

A. Yes, sir.

Mr. Young: I offer this in evidence.

Mr. Hawkins: To which I object. It is the same one that was objected to by counsel yesterday and is identical to our exhibit 5.

Mr. Young: It bears the signatures.

(Testimony of H. J. Adams.)

Mr. Hawkins: As does the one that was objected to.

The Court: It may be admitted. Of course, the same question comes up now. The same contract [102] was objected to yesterday and I only allowed it in for a limited purpose. Now counsel for the defendants offers it and I am going to admit it. I don't know what may develop here.

Q. Following that,—strike that, please,—after the contract was drafted,—were you present when the final draft was made of exhibit 15?

A. Yes, sir.

Q. Did you sign it as soon as it was completed?

A. Yes, sir.

Q. Where did you sign it?

A. In the office of Cullen and Etter.

Q. Were you given a copy of the contract?

A. Yes, sir.

Q. Then what did you do?

A. I was supposed to meet Mr. Casey—

Q. You met Mr. Casey, did you?

A. Yes, sir, when he returned from Thermopolis, I met him, I was to get his signature to the contract.

Q. Did you get his signature?

A. He refused to sign.

Mr. Hawkins: Objected to as immaterial.

The Court: I think it is immaterial, but I will let it stay.

Q. Following Mr. Casey's refusal to sign the contract [103] what did you do next?



(Testimony of H. J. Adams.)

A. I met with the parties who were furnishing the money in Thermopolis, Mr. Charles Vandenhoo—

The Court: —Now this is too far afield. You will have to confine your evidence to this contract.

Q. Was there some dealings with Mr. Casey? If so, how was that handled?

Mr. Hawkins: I shall object to "some dealings."

The Court: I think Counsel knows what my thought is. I think counsel would agree with the Court that this is a question between Mr. Casey and Cullen and Etter. If we are to go into all the conversations between Mr. Adams and Mr. Casey and all these other people, we will be here a long time. At least this should be in the presence of Cullen and Etter.

Mr. Young: I want to lead directly to the exhibit.

The Court: Go ahead and do that.

Q. Are you acquainted with the execution of exhibit 6?      A. Yes, sir.

Q. Where was that executed?

A. In Mr. Nixon's office in Bonners Ferry.

Q. Mr. Nixon the attorney?      A. Yes, sir.

Q. Was a copy of that delivered to you?

A. Yes, sir. [104]

Q. What did Mr. Cullen and Mr. Etter have to do with the performance of the terms of the contract exhibit 15, if anything?

A. They were to secure the stock and assign-

(Testimony of H. J. Adams.)

ments of any outstanding interest of the Sulphur Springs Gypsum Company, together with the books of the Company, the check book and minute book and have a meeting of the Board of Directors to have them resign so that everything could be turned over to the new corporation, the Wyoming Sulphate Company.

Q. The new company took over the holdings of the Sulphur Springs Gypsum Company?

A. Yes, sir.

Q. Where and how was that accomplished?

A. In the office of Huntington in Billings, Montana. Mr. Etter took the papers to Billings, Montana; met there with Mr. George C. Sinton, and Mr. Casey was there, and Charles Vandenhook was there.

Q. Mr. Etter was in Billings?

A. I meant Mr. Cullen.

Q. At that time what was done. I assume the money was transferred in exchange for the securities?

Mr. Hawkins: Ask him what was done?

Q. What was done?

A. The deal was completed as had been planned.

Q. Were all the terms of exhibit 15 performed?

Mr. Hawkins: Objected to as that is not an issue here.

The Court: That would be for the jury to decide. He can testify as to what was done but I think that is immaterial.

(Testimony of H. J. Adams.)

Q. What was done?

A. There was some little change made. Mr. Vandenhook was a hard-boiled banker.

Mr. Hawkins: Move to strike that last portion.

The Court: It may be stricken.

Q. What was done?

A. The deal was completed, the papers turned over and Mr. Cullen returned the same day he arrived in Billings.

Mr. Young: You may inquire.

#### Cross-Examination

By Mr. Hawkins:

Q. You said you had some tough experience in California, what was that?

The Court: I think that would be immaterial.

Mr. Hawkins: It would go to the credibility of the witness.

The Court: I don't want to place any man on defense of any other matters. We might have to try out everything in connection with other deals he may have had. I have suggested that we have gone far [106] afield in this trial.

Mr. Hawkins: We will drop the matter.

Q. This Company you are employed by, is that the successor to the Sulphur Springs Gypsum Company?      A. Yes, sir.

Q. Isn't it a fact that you were first in the office of Cullen and Etter on March 6, instead of the 13th?      A. No, sir.

(Testimony of H. J. Adams.)

Q. You were not there at that time?

A. No, sir.

Q. On March 13th was the first time you met Cullen and Etter?

A. It didn't take more than four days.

Q. Is March 13 the first time you met Mr. Cullen and Mr. Etter?

A. Either the 13th or the 14th.

Q. How many times were you there in the office of Cullen and Etter? A. It didn't take——

Q. Tell me this, Mr. Adams, when was the contract completed? A. On March 23.

Q. You were there every day from the 13th to the 23rd? A. Yes, sir.

Q. Then it did take more than four days if it was from the 13th to the 23rd?

A. Not over a week, from the beginning, there was Saturday and Sunday in there.

Q. Referring to exhibit 6 you didn't sign that exhibit? [107] A. No, I did not.

Q. That was signed about when, on the date it bears? A. No, sir.

Q. When was it signed?

A. About April 5th or 6th.

Q. About the 5th or 6th of April?

A. Along in there?

Q. Why was it dated back to the 23rd of March?

A. For the reason that I had agreed to pay interest from the date of the original contract which was March 23rd.

(Testimony of H. J. Adams.)

Q. To make it a part of the same deal?

A. At the same time at any rate.

Q. From the 13th to the 23rd of March, when you were there, was Mr. Davis, Keinholtz, Casey and Busch, were they there?

A. Not always but they were there on three out of four times.

Q. Mr. Cullen and Mr. Etter represented them?

A. I don't know anything about any arrangement except the Sulphur Gypsum Company.

Q. You had your attorney, Mr. Huntington?

A. Yes, sir.

Q. And these men here represented those other men?

A. I had Del Carey Smith look over this.

Q. The other attorney that met with you was Huntington, and there was Mr. Cullen and Etter?

A. That's right.

Q. Mr. Cullen continued on through the whole thing until [108] the closing of the transaction?

A. Yes.

Q. At Billings?

A. They were both very active.

Q. When was that closed?

A. May 6th, 1948.

Q. You first met them on the 13th of March?

A. Yes, sir.

Q. And this continued to May 6th?

You testified that these other men had meetings for some time with Cullen and Etter?



(Testimony of H. J. Adams.)

A. Yes.

Q. You heard the testimony here yesterday that this started in February and continued until the 6th of May?

A. Yes, I heard that.

Q. Did these men get back all the money they had invested, plus interest?

A. Yes, they got more than they invested.

Q. They got it by virtue of the contract?

Mr. Young: Objected to as immaterial.

The Court: It would be a conclusion on his part. You don't want this man to decide the case, I think the jury can do that.

Q. What was paid by you or through you by virtue of this agreement?

A. \$175,000.00.

Q. What was turned to Cullen and Etter? [109]

A. \$88,400.00.

Q. What was the amount of the claims including the interest?

A. I cannot say.

Q. Were the claims set up in the contract based on computations of what they had coming?

A. Yes, sir.

Q. Were you in the office,—you heard Mr. Etter state that he pointed out to the people there that they would have to proceed as individuals and he said, “you will have to proceed as individuals, do you want us to go ahead”?

Mr. Young: Objected to as improper cross-examination?

The Court: I think he said that he was not at that meeting.

(Testimony of H. J. Adams.)

A. No, I was not there.

Q. \$88,420.00 could that be the amount turned to Cullen and Etter?      A. Yes.

Q. The difference between that and the \$175,000.00 going to Casey?

A. No, there were other stockholders not represented.

Q. How much was given to Casey?

A. The money was turned over to the Bank at Worland to clean up the indebtedness on the equipment.

Mr. Young: Was any money turned over to Cullen,—rather to Casey at Billings in your presence?

A. Mr. Cullen told me there was a \$16,000.00 check turned over to him.

Q. You didn't see that happen?

A. There were two or three offices we were in.

Mr. Young: That is all.

Mr. Hawkins: That's all.

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### CHARLES H. BICKERSTAFF

called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Young:

Q. Where do you live?      A. Spokane.

Q. How long have you lived there?

A. Four years?

(Testimony of Charles H. Bickerstaff.)

Q. What is your business?

A. Feed business.

Q. Does your name appear on exhibit 15? Are you a former stockholder of the Sulphur Springs Gypsum Company?

A. Yes, it does.

Q. Were you on the Board of Directors of the Sulphur Springs Gypsum Company?

A. Not at the time of this contract.

Q. Were you in the office of Cullen and Etter during the negotiations leading up to the adjustment with Mr. Adams?

A. No, sir, I was not. I was there later but not when the [111] first contract was drawn?

Q. Were you in the office at any time when there was a discussion?

A. Yes, sir.

Q. When were you there?

A. I cannot tell the date but we were all there?

Q. Who was present?

A. Usually Frank Davis, Bill Simanton, Keinholz, and Frank Busch, I can't remember exactly but they usually were there?

Q. Did you agree to get other stockholders to turn over stock to Cullen and Etter?

A. Yes, I agreed to try.

Q. What was said with Cullen and Etter with respect to their employment?

Mr. Hawkins: When and where?

A. I cannot give the exact words.

Mr. Young: It is a question of whether or not there was a contract?

(Testimony of Charles H. Bickerstaff.)

The Court: He may answer. The question is the employment by these defendants of Cullen and Etter.

A. I don't remember how many times Casey was there. I don't remember the exact discussion with Cullen and Etter. Those things were never dreamed by me to be brought up again. He was there a time or two. [112]

Q. Do you know why he was there?

A. In the interest of the Company.

Q. Was Casey a member of the Board of Directors to your knowledge?      A. Yes, sir.

Q. Did you have any discussion with Mr. Etter or Mr. Cullen with respect to their fees?

Mr. Hawkins: Between whom?

Mr. Young: Between them and himself.

A. The only time was when we went up for settlement.

Q. What was said by Cullen or Etter or either of them with respect to their fees in this case?

Mr. Hawkins: Objected to as this is not an issue in this case, a question of their fees as between Cullen and Etter and Mr. Bickerstaff is not an issue here.

The Court: Sustained.

Mr. Young: You may inquire.

#### Cross-Examination

By Mr. Hawkins:

Q. Mr. Bickerstaff, you have been in the same

(Testimony of Charles H. Bickerstaff.)

office with Mr. Casey or officed in the same building with him?

A. They had their office in our building.

Mr. Hawkins: That is all.

Mr. Young: That's all, thank you.

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C. W. KING

called as a witness on behalf of the defendants after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Where do you live, Mr. King?

A. Bonners Ferry, Idaho.

Q. How long have you lived there?

A. Thirty-five years.

Q. What is your business? A. Retired.

Q. What was your business?

A. Newspaper publisher.

Q. Did you have any other business?

A. I had an interest in farming land?

Q. Were you ever associated with Mr. Casey in any business connected with the Sulphur Springs Gypsum Company? A. I was.

The Court: It seems to me we are going far afield again.

Q. What was your connection with the Sulphur Spring Gypsum Company?

A. Mr. Casey and I were co-partners forming



(Testimony of C. W. King.)

the Wyoming Mineral Products Company which had the sales contract for the Product of the Sulphur Springs Gypsum Company.

Q. I hand you exhibit marked 16 for identification and I will ask you what it is? [114]

A. That is a contract between the Sulphur Springs Gypsum Company and the Wyoming Mineral Products Company whereby we handled their product.

Mr. Young: I am offering it in evidence. I am going to show the value of that and am going to show that Mr. Casey didn't receive anything of value in this transaction that the plaintiffs are attempting to show.

Mr. Hawkins: Objected to as being immaterial here.

The Court: I don't see the materiality of it at this time, however, it may be admitted.

Q. Now, Mr. King, you are handed exhibit 6 which is admitted in this case, do you know by whom that exhibit was prepared?

A. By myself.

Q. After it was prepared what was done with it?

A. Just how do you mean?

Q. Did you go over it with anyone, and if so, whom?

A. Mr. Nixon.

Q. Following Mr. Nixon's examination was it delivered to anyone and if so, whom?

A. I think it was turned over to Mr. H. J. Adams on the same day.

(Testimony of C. W. King.)

Q. What was the net worth of the Wyoming Mineral Products Company—— [115]

Mr. Hawkins: I object——

Mr. Young: I had not finished the question.\*

Mr. Hawkins: Pardon me.

Q. ——what was the net worth of the Wyoming Mineral Products Company at the time of its transfer to the purchasers of it in accordance with the terms of exhibit 15?

Mr. Hawkins: Objected to as entirely irrelevant.

The Court: I am going to admit it. I think that is the only way we will get a little speed here is to permit everything to go in.

A. I could give you my opinion, when I disposed of my interest——

Q. When was that,—strike that,—Did Mr. Casey buy your interest?      A. Yes sir.

Q. What did he pay you?      A. \$26,000.00.

Q. For a half interest?      A. Yes sir.

Q. When did that transaction take place?

A. About one year prior to this date here.

Q. What, in your opinion, was the value of the Company at the time of this transaction?

The Court: If he knows.

Q. Yes, if you know?

Mr. Hawkins: He said he sold his interest a year before. [116]

Q. At the time you prepared your option what was the net worth?

A. A fair figure would be \$60,000.00 at least.

(Testimony of C. W. King.)

Q. I have had handed to you exhibit 17 marked for identification what is that Mr. King?

A. A chattel mortgage given by Anderson Brothers to the Farmers State Bank.

Q. Was that mortgage a part of the property of the Wyoming Mineral Products Company?

Mr. Hawkins: I object to this, he has just testified that it was a chattel mortgage given by Anderson Brothers to the Farmers State Bank.

The Court: He has identified it, I think no doubt the instrument is the best evidence.

Q. Was that chattel mortgage referred to in exhibit 6 as one of the properties Mr. Casey was going to transfer? A. Yes sir.

Mr. Hawkins: We object to this as it is not between the parties to this action.

The Court: I will admit it in view of the fact that I admitted the other.

Q. Did you discuss with Mr. Casey whether he should or should not,—or did you give him advice as to whether he should enter into exhibit 15 the option agreement running from Mr. Adams to the other named persons? [117]

Mr. Hawkins: I object to that, certainly that advice would not be a matter which would be material here.

The Court: I think perhaps you are right but I will let him answer. A. I did.

Q. What discussion did you have or what advice did you give him? A. I advised him not to.

(Testimony of C. W. King.)

Q. In lieu of that advice was exhibit 6 prepared by you? A. If it is the option, it was.

Q. Did Cullen and Etter have anything to do with the preparation of exhibit 6, or did they assist in any way? A. No sir.

Mr. Young. You may examine.

### Cross Examination

By Mr. Hawkins:

Q. Cullen and Etter didn't sign it either did they? A. No sir.

Q. About a year prior to exhibit 6 you sold out your undivided one-half interest?

A. It would be in September 1946.

Q. About one and a half years. A. Yes sir.

Q. You sold your half interest in the Wyoming Mineral Products [118] Company and for that you received \$26,000.00. A. Approximately.

Q. Was Mr. Casey the sole owner of it?

A. He was so far as I know.

Q. At the time this agreement was entered into your estimate of the value of that Company was sixty thousand dollars? A. Yes sir.

Q. You have no interest in this and you were never in Cullen and Etter's office? A. No sir.

Q. Never present at any of the conversations?

A. No sir.

Q. Have you ever met Cullen or Etter?

A. No sir.

Mr. Hawkins: That is all.

Mr. Young. That is all.

ROBERT KING

Called as a witness on behalf of the defendants,  
after being first duly sworn testifies as follows:

Direct Examination

By Mr. Young:

Q. Where do you live?

A. Bonners Ferry.

Q. How long have you lived there? [119]

A. Thirty-four years.

Q. Were you connected with the Wyoming  
Mineral Products Company? A. Yes sir.

Q. In what capacity? A. As a salesman.

Q. How long were you connected with it?

A. About a year.

Q. When did that employment commence and  
when did it cease?

A. December 1, until about a week ago. Decem-  
ber 1, 1947.

Q. Are you familiar with the amount of business  
done by that Company? A. Yes sir.

Q. Was that business solely confined to the sell-  
ing of the products of the Sulphur Springs Gyp-  
sum Company? A. Yes sir.

Q. How much of that product was sold during  
that period of time?

Mr. Hawkins. Certainly this is not material.

The Court: If it is we will certainly have to  
have a lot of witnesses here. I want the jury to  
have everything but I fail to see the materiality  
of this.



(Testimony of Robert King.)

Q. Can you quickly give us some extent of the sales?

A. During the time I was employed I would say approximately two hundred fifty carloads.

Q. How much is a carload?

A. About fifty tons. [120]

Q. How much a ton?

A. Seventeen dollars F O B at the mine in Thermopolis, Wyoming.

Q. What, in your opinion, was the value of the Company assuming it was to be sold out, lock stock and barrel. What was the value of the Company, in your opinion?

A. Approximately \$225,000.00. I am speaking of the whole thing, the Wyoming Products Company and the Sulphur Springs Gypsum Companies.

Q. I am talking about the Wyoming Mineral Products Company.

A. I would say that was worth a hundred thousand dollars.

Mr. Young: That is all, you may examine.

#### Cross Examination

By Mr. Hawkins:

Q. If it was worth a hundred thousand dollars and they bought out Mr. Casey for a hundred seventy thousand—

Mr. Young: —I object to that as being argumentative before the question is finished.

Mr. Hawkins: I think there are no further questions.

W. L. CASEY

Called as a witness on behalf of the defendants,  
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Your name is W. L. Casey?

A. Yes sir. [121]

Q. You are one of the defendants here?

A. Yes sir.

Q. Where do you live?

A. Bonners Ferry, Idaho.

Q. How long have you lived there?

A. About thirty years.

Q. What is your general business background?

A. Grain and feed elevator business and farming.

Q. Tell us how you came to be associated with the Sulphur Springs Gypsum Company?

A. I became interested with Charley King as a partner in taking the distribution for the United States for handling the product of the Sulphur Springs Gypsum Company.

Q. Was that as a result of the contract that has been introduced here in evidence, leading to the organization of the Wyoming Products Company?

A. That's right.

Q. When did you become a member of the Board of Directors of the Sulphur Springs Gypsum Company, or did you become a member of the Board of Directors of that company?

A. Yes sir.

Q. What brought that about?

(Testimony of W. L. Casey.)

A. At the annual meeting at Thermopolis.

Q. Did you own any stock in the Sulphur Springs Gypsum Company at that time? [122]

A. I did not.

Q. How did you get your stock?

A. Mr. Adams gave me twenty-five hundred shares so I could be on the Board of Directors, that was to bring the Board of Directors to Spokane, Washington, where they could be together. For that reason I went on the Board.

Q. When did you first start dealing with Cullen and Etter,—how was that brought about?

A. Sometime I think about the first of March,—the first part of March or the latter part of February when our Company was trying to get things reorganized, we had our offices, that is, the Wyoming Mineral Products Company and the Sulphur Springs Gypsum Company had offices together, one bookkeeper did the bookkeeping for both concerns.

Q. When did you first hear about the firm of attorneys of Cullen and Etter?

A. We had quite a few meetings at Spokane of the Board of Directors of the Company and what came out of these meetings,—we wished to get the Company in as good a shape as we could. Mr. Simanton recommended that he knew Mr. Cullen and he said he would have him come to a meeting at the Spokane Hotel, he notified him of the meeting and that is the first time I met Mr. Cullen.

Q. Did you go to the office of Cullen and Etter?

(Testimony of W. L. Casey.)

A. Yes sir. [123]

Q. What transpired there?

A. We had occasion to go to their office for the purpose of what we hired them for, to try to bring about a more substantial working of the Sulphur Springs Gypsum Company.

Q. Did you arrange to have Mr. Adams come there?      A. Yes sir.

Q. How were you trying to reorganize the Sulphur Springs Gypsum Company at that time?

A. We were attempting to get it back on a more substantial basis than it was by getting more money in it.

Q. You heard Mr. Cullen and Mr. Etter testify that the Sulphur Springs Gypsum Company hired them to go over an audit report, what is your knowledge of that?

A. We went up and retained them to go over this report and give us advice on how to proceed.

Q. Was that employment as a member of the Board of Directors limited to looking over the C P A audit and rendering some opinion in connection with the C P A report?

A. That is my opinion.

Q. Was that employment limited to this C P A report?      A. No sir.

Q. There was a general retainer?

A. That's right.

Q. Were you representing your individual capacity or were you there representing the Sulphur

(Testimony of W. L. Casey.)

Springs Gypsum Company [124] as a director, in their office?

A. I was representing the Sulphur Springs Gypsum Company.

Q. At all times? A. At all times.

Q. When did exhibit 15,—when did you first see that? A. That is the contract?

Q. That is the contract that Adams had.

A. That came out of a meeting or the meetings we had up there.

Q. When did you first see it after it was prepared? A. I think it was along about May.

Q. Were you ever requested to sign it?

A. Yes sir.

Q. Who requested you to sign it?

A. I believe it was Mr. Cullen.

Q. What did you tell Mr. Cullen as to whether you would or would not employ him under that contract?

A. My thought was that it was for the Sulphur Springs Gypsum Company all the way through.

Mr. Hawkins: Let's get the facts, not what his thought was.

Q. Mr. Casey, you are not permitted to testify to your thoughts. Did you tell Mr. Cullen and Mr. Etter that you were not employing them individually?

Mr. Hawkins: Objected to as leading. What he did talk about would be all right. [125]

The Court: Go ahead, he may answer.



(Testimony of W. L. Casey.)

A. I never told them I was employing them as an individual.

Q. When was the first time you became aware of the claim that Cullen and Etter were making of having rendered service to you individually for which they intended to charge you individually?

A. When I got notice of this suit.

Q. You had no information about any claim except this lawsuit?      A. That is right.

Q. You heard Mr. Etter testify that you were urging him to go to Billings to represent you in the matter of the completion of this transaction. What is your recollection of that?

A. I don't recall that I asked him. The other members, Mr. Keinholz, Mr. Davis, Mr. Busch, Mr. Bickerstaff and Mr. Simanton, especially Mr. Busch thought he should go over as he couldn't go, he was the President of the Sulphur Springs Gypsum Company and he thought he should have an attorney over when the money was paid over.

The Court: We will take a ten minute recess.

November 24, 1948, 11:15 A. M.

Q. I will ask you this question directly, did you ever at any time urge Mr. Etter to do anything in connection with this transaction that is in controversy here?      A. For the Company.

Q. For you individually?

A. No sir, I didn't.

Q. After you had given Mr. Adams exhibit numbered 6, which is an option, when did you go to Montana with relation to that time?

(Testimony of W. L. Casey.)

A. I went over about a week before the money was paid over in Billings.

Q. What did you do when you got to Billings?

A. I first got hold of Anderson Brothers who had a contract for mining the gypsum and then got hold of Mr. Sinton who was putting up the money to get our deal put over. The Company said they wouldn't make the deal until they got my contract of distribution, and warehouses and machinery and equipment at Thermopolis that the Company owned.

Q. Did you arrive at a figure as to what you would take for your interest including the sales contract?

A. Yes sir, I did.

Q. What in addition to the sales or distribution contract did you agree to yield up?

A. Mortgage on the equipment that I had from Anderson Brothers at the time it was about \$23,000.00 that I had a mortgage for.

Q. With respect to the mortgage what was the value of the equipment that you had a mortgage on?

A. That equipment was sold to Mr. George Sinton for seventy-one thousand dollars.

Q. That mortgage is in evidence now?

A. Yes sir.

Q. There was a balance of \$23,000.00 on it?

A. \$23,698 balance on the mortgage.

Q. The sales contract or the distribution contract, what was the value of that, in your opinion?

A. The value of that at that time I would say was \$65,000.00 or \$70,000.00.

(Testimony of W. L. Casey.)

Q. Did you have some stock of the Sulphur Springs Gypsum Company?

A. Yes sir, I also had a \$15,000.00 note on which there had been about a thousand paid, leaving a balance of \$14,000.00 for which I had to put up as security 23,500 shares of Sulphur Springs Gypsum stock.

Q. Were you required as a part of the transaction to yield up that note and stock?

A. Yes sir.

Q. What else did you yield up as a part of the consideration for what you were to be paid?

A. For a number of years I had dealers' advertising contract,—sales book contracts for the dealers that I turned over to them.

Q. Were these properties required to be delivered from you to the new buyer? [128]

A. That's right, they were.

Q. If you had not delivered these properties to the new buyer state whether or not the transaction could have been completed?

A. For myself,—with the distribution contracts, my interest with Mr. Anderson's contract down there, no,—if that had not been delivered the deal would not have gone through.

Q. The deal would not have been consummated?

A. No sir, it would have been impossible.

Q. What did you receive for those properties?

A. I received \$23,698.00 from Anderson Brothers that I had a mortgage for. I received \$16,618.00

(Testimony of W. L. Casey.)

at the time of the settlement in Billings, cash of \$40,316.00 in addition to a \$10,000.00 note and a two thousand dollar note from Adams. If I hadn't taken those notes according to the deal I had given him it wouldn't have gone through, I had to accept twelve thousand dollars in notes or that would have queered the deal.

Q. Have any of those notes been paid?

A. No sir.

Q. The Two thousand dollar note, is it past due?

A. It is.

Q. It has not been paid? A. No sir.

Q. Have you any security for it? [129]

A. No, sir.

Q. What about the ten thousand dollar note?

A. It is not paid.

Q. You have no security for it? A. No.

Q. Had you contemplated or had you known that Cullen and Etter were contemplating charging you fifteen thousand dollar attorney's fees or any substantial fees would you have agreed to the transfer of that property to consummate this transaction?

Mr. Hawkins: Objected to as immaterial.

The Court: He may answer.

A. No.

Q. You heard Mr. Cullen testify to the fact,—strike that,—I will ask you whether or not you made or lost money on this transaction?

The Court: That is far afield.

Mr. Hawkins: I will object to that as immaterial.

The Court: Sustained.

(Testimony of W. L. Casey.)

Q. You heard Mr. Cullen testify that after this transaction had been completed and after he was given eighty-eight thousand dollars for his clients that you came up and met him and put your arm around his shoulders and said, "this is a good job," or "this is a great job, I owe you several thousand dollars and I am going to pay you several [130] thousand dollars." Did you make such a statement?

A. I did not.

Q. In substance or effect?                      A. No, sir.

Q. You heard that testimony. Now did you in substance or effect say, "I realize I owe you several thousand dollars and I am going to pay you," did you ever make a statement of that sort, in substance or effect?                      A. No, sir.

Q. Did you consider that you, when you were in Billings,—did you consider that you owed the firm of Cullen and Etter any money?

Mr. Hawkins: Object to that, what he considers is immaterial.                      A. No.

The Court: He said that he didn't consider that he owed them anything, it may stand.

Q. Do you recall the testimony of Mr. Etter that he called you on the phone and he wanted you to come in and straighten this matter up and you explained that you were hard pressed, that you had your money tied up in sacks, do you recall any such statement?

A. Mr. Cullen nor Mr. Etter never mentioned any attorney's fees that I owed them.



(Testimony of W. L. Casey.)

Q. Did you ever tell them your funds were tied up in sacks and that you couldn't get any but you would shortly? [131]

A. No, sir.

Q. That conference did not occur?

A. No, sir.

Q. You had no such conversation?

A. No, sir.

Q. Did Mr. Cullen or Mr. Etter or either of them assist you in any manner in the making of your deal with the new buyer of the Sulphur Springs Gypsum Company? A. No, sir.

Q. Did they frame documents or contracts for you to use in connection with any such deal?

A. No, sir.

Q. Did they advise or counsel with you in that connection? A. No, sir.

Q. They stated that you were in their office about thirty-one times during the course of this business, what is your recollection of the number of times you were in the office of Cullen and Etter?

A. That is hard to remember because I had so much other business other than this at home to take care of, however, Mr. Busch, the President of the Company, living at Spokane——

Mr. Hawkins: That is not responsive and we object.

Q. My question was, how many times were you in that office?

A. To my recollection not over five or six times.

Q. All together? A. That's right.

(Testimony of W. L. Casey.)

Q. You heard Mr. Etter testify that the Board of Directors were in their office sitting around and he went around to each member present and said you will have to proceed as individuals, do you want to proceed as individuals? Now, do you recall that?

A. No.

Q. And that they all agreed. Do you recall of them agreeing? A. I don't recall that.

Q. Do you believe that occurred? A. No.

Q. State whether or not it did occur?

A. Not to my knowledge.

Q. In connection with these letters after this contract exhibit 15,—what is the circumstances of these letters, how did you happen to be interested in these letters?

A. I wrote those letters at the request of Mr. Busch because he was not there.

Q. Five hundred dollars was sent to a Mr. Liner. What was the circumstances of that \$500.00 being sent?

A. That was by my personal check, or rather the check of Wyoming Mineral Products Company, not a personal check.

Q. By check of the Wyoming Mineral Products Company? A. That's right. [133]

Q. Whose money was actually sent down?

A. My money.

Q. What if anything did the Sulphur Springs Gypsum Company do by way of repaying you?

A. They gave me the money back. It was sug-

(Testimony of W. L. Casey.)

gested to Mr. Cullen and Etter that the money be sent down but that someone else send it,—that owed the note. The Sulphur Springs Gypsum Company owed that note. The purpose was to stall it along.

Q. The Sulphur Springs Gypsum Company gave you the five hundred dollars and you sent your check down?      A. That's right.

Q. On whose behalf was that service performed?

A. The Sulphur Springs Gypsum Company.

Q. Was that fact made known to Mr. Cullen and Mr. Etter?      A. They knew it.

Q. Do you have a regularly retained attorney to take care of your private business?

Mr. Hawkins: That is objected to, this is a matter of contract with Mr. Cullen and Mr. Etter.

The Court: I feel that we have violated about every rule of evidence during this trial. I will sustain this objection.

Mr. Young: I would like to make an offer of proof. [134]

The Court: Go ahead, let him answer the question. It is much quicker.

Q. Do you have a regular attorney for your business?      A. Yes, sir.

Q. How long have you had that attorney?

A. About four years.

Q. Who is that attorney?      A. Mr. Nixon.

Q. Did you consult with Mr. Nixon on how you were to handle this business in Montana?

Mr. Hawkins: Objected to again as immaterial.

The Court: He may answer.

(Testimony of W. L. Casey.)

A. Yes, I did.

Q. You recall Mr. Cullen testified that you told him that you got forty thousand dollars in cash in Billings?

A. Yes, I recall that.

Q. Did you make such a statement?

A. No sir, I couldn't have because I didn't get it.

Q. Exhibit 18 which was marked for identification has been handed to you. Will you tell us what it is?

A. This is a receipt for moneys and for everything I turned over to the new Company.

Q. Does that represent all the money you received?

A. Yes, sir. [135]

Q. Everything is stated in that receipt?

A. Yes, sir; everything is stated in here.

Q. Was that given to you as completing the deal?

A. Yes, this is the completion of the deal.

Q. Did you have that receipt at the time Mr. Cullen was over there?

A. Yes, sir; I got it at the same time he was there.

Mr. Young: I offer this in evidence.

Mr. Hawkins: No objection.

The Court: It may be admitted.

Mr. Young: You may cross examine.

### Cross-Examination

By Mr. Hawkins:

Q. Mr. Casey, your business was grain, feed and elevator business?

A. Yes, sir.

(Testimony of W. L. Casey.)

Q. You are still in that business? A. No.

Q. Recently sold that?

A. Yes, sir. Recently sold.

Q. What business are you engaged in now?

A. No business.

Q. Have farming interests.

A. Sold the farming interests.

Q. Liquidated all your business interests?

A. On account of my health.

Q. Your first introduction to the Sulphur Springs Gypsum Company [136] was when you got twenty-five hundred shares of stock so that you could get on the Board of Directors so that you could move the Board to Spokane?

A. Yes, sir.

Q. That was as a director? A. Yes, sir.

Q. Did you ever pay for that? A. No, sir.

Q. Why did you get on the Board of Directors, was there any reason?

A. To make a quorum and because of the contract I had.

Q. You are referring to the Wyoming Mineral Products Company.

A. Yes, sir, that's right, the contract I had with the Sulphur Springs Gypsum Company when we had a meeting there was not enough to have a full amount of the directors to move up here, so I went on the Board.

Q. Did some others go on the Board at that time? A. Yes, sir.

Q. Mr. Busch, Davis, Keinholz got on the board at that time?



(Testimony of W. L. Casey.)

A. That's right.

Q. Was there some difficulty about the management of the Company at that time?

A. Yes, sir.

Q. You were afraid of the management of the company?      A. Yes, sir. [137]

Q. You wanted to get on the Board to straighten that up?

A. No, I wanted to get it straightened up, but I didn't figure that I should be on the Board.

Q. Did you then employ a firm of Certified Public Accountants to give you a report?

A. Yes, sir.

Q. Did you get a report?      A. Yes, sir.

Q. Did you hold a meeting with respect to that?

A. Yes, sir.

Q. Was Mr. Cullen at that meeting?

A. Yes, sir.

Q. How did he happen to be there?

A. There was some discussion as to what attorney——

Q. ——Let me ask this, who invited Mr. Cullen or Mr. Etter there?      A. Mr. Simanton.

Q. Did you have the report of the C P A there?

A. No, I don't think we did.

Q. Or the books of the company?

A. No, sir.

Q. Did Mr. Cullen advise you that evening or give you any opinion or advice?

A. No, I think he was there for dinner, I think there was just a discussion. [138]

(Testimony of W. L. Casey.)

Q. He was there as an attorney for the purpose of determining what the facts were?

A. I recall we had another attorney at that time.

Q. Somebody invited Mr. Cullen?

A. They must have, I didn't.

Q. That is where you first met him?

A. Yes, sir.

Q. Did you later meet him again in his office?

A. Yes, sir.

Q. Do you remember when you first called at the office of Cullen and Etter?

A. Not exactly.

Q. Isn't it a fact that it was on March 3, 1948, you and Mr. Davis called on Cullen and Etter?

A. I wouldn't remember the dates.

Q. At that time were the books of account in the office of Cullen and Etter?

A. I think they were.

Q. Did you confer concerning any findings they had made or recommendations they had to make?

A. That's right.

Q. Did you go back on the 4th of March?

A. I don't recall going back the next day.

Q. And again on the 5th you and Mr. Busch went in in the afternoon?

A. Yes, I remember that. [139]

Q. And on the 6th you were advised that because a majority of the stock was in the hands of Mr. Adams you would have to proceed on an individual rather than a corporate basis?

(Testimony of W. L. Casey.)

A. I don't remember.

Q. Was it at that time you started on this individual contract?

A. That I started on this contract, you say?

Q. Isn't that when you started to discuss drawing up a contract between those investors and Mr. Adams?

A. That's right.

Q. It ultimately culminated in the contract of March 23rd?

A. I don't remember what was the date.

Q. Exhibit 15 bears the date of March 23rd?

A. Yes, sir.

Q. During that time from the 3rd of March to the drafting of this contract you were in and out of Cullen and Etters' office on many occasions?

A. I don't remember how many. I was there, yes, in behalf of the Sulphur Springs Gypsum Company and my own individual stuff was separate.

Q. You had stock in the Sulphur Springs Gypsum Company?

A. Yes, sir, and on the Board of Directors.

Q. You had an individual investment of approximately sixty-five thousand, or rather, sixty-nine thousand, five hundred dollars? [140]

A. That is what we talked about.

Q. You gave them that information?

A. I gave them that. That was my best estimate. That is what I thought I had.

Q. You wouldn't set it out then because you wanted to make a trip down to Wyoming to get the definite figure?

(Testimony of W. L. Casey.)

A. I wouldn't go into that because Anderson Brothers were tied up with me; they were the contractors down there, I was the distributor for the product of the Company, I couldn't very well do anything until we got Anderson in the same frame of mind I was in.

Q. You went to Thermopolis to determine so that you would know what you had coming from the Sulphur Springs Gypsum Company, and the amount you would have to turn over?

A. In talking to Anderson I found out what it would take to get me out?

Q. That is why your amount was left indefinite at that time?

A. I didn't know at that time what I had.

Q. On the 6th of March do you recall sitting in there with Busch, Davis, Keinholz and Cullen and Etter, you remember the conversation with the six of you present on the afternoon on that day?

A. There possibly might have been one.

Q. Do you recall on that occasion Mr. Cullen or Mr. Etter [141] advising you that the corporation, or that you could no longer proceed as a corporation because you couldn't represent yourselves individually and as a corporation, or directors of the corporation, do you remember that?

A. I don't remember it,—I was in at different times.

Q. You were in this group, you were a director?

A. That's right, I was a director.

(Testimony of W. L. Casey.)

Q. You had money in the Sulphur Springs Gypsum Company? A. Yes, sir.

Q. Invested in the Sulphur Springs Gypsum Company?

A. No, sir, I had no money invested.

Q. You had claims? A. Yes, sir.

Q. You were a claimant, and you were also a director? A. That's right.

Q. Did Mr. Etter advise you that you could not as a director prosecute your claim for individual recovery? A. Not that I recall.

Q. He didn't so advise you? A. No, sir.

Q. Do you recall that he advised the other three men? No, sir, I don't recall.

Q. You heard the testimony of Mr. Davis and Mr. Keinholz here yesterday?

A. Yes, I did. [142]

Q. You testified here as to some values; this mortgage by Anderson for \$23,680.00 I believe it was, against some personal property.

A. It was \$36,000.00 at first.

Q. At the time of the settlement it was some \$23,000.00. A. Yes, sir.

Q. From March 6, down to the time of settlement had you received any money from the Sulphur Springs Gypsum Company for royalties or payment on this mortgage? A. Yes, there was some.

Q. How much money was paid between the 6th of March down to the 6th of May?

A. I wouldn't recall, but we had fifty cents roy-



(Testimony of W. L. Casey.)

alty coming from Anderson Brothers to apply on this mortgage.

Q. When you originally submitted the figure on the 6th of March it was \$69,500.00 and you say you collected \$52,316.42? A. Yes, sir, that's right.

Q. Did you collect as much as seventeen thousand dollars between the 6th of March and the 6th of May? A. No, sir.

Q. Well, what is your best estimate?

A. That would run in the channel of business, what we were making.

Q. It was a part of the claim against the Sulphur Springs Gypsum Company and your contract with them?

A. I couldn't say where I had any money except that I had [143] that Sulphur Springs Gypsum Company stock and that note for \$15,000.00 that we advanced.

Q. The \$69,500.00 that included not only your individual claims but also that of the Wyoming Mineral Products Company, did it not?

A. I couldn't see how the Wyoming Mineral Products Company had any claims.

Q. They were getting royalties?

A. Getting some money back through royalty from Anderson Brothers.

Q. Were you getting any individual royalties?

A. No, sir.

Q. All the royalties were going to the Wyoming Mineral Products Company?

(Testimony of W. L. Casey.)

A. Yes, sir, Anderson Brothers were paying fifty cents a ton.

Q. You did get some money between the time you first started negotiating the contracts down to the final settlement, you got some money?

A. From the time we started negotiating the contract until when?

Q. May 6?

A. Very little, we didn't do much business.

Q. You don't know how much?

A. No, sir, I don't.

Q. Did they pay you on the mortgage between March 6 and May 6?

A. There would have been some,—no, not any paid on the mortgage. [144]

Q. Reading from Exhibit 6, "a certain second mortgage issued by Anderson Brothers, contractors, of Thermopolis, Wyoming, in the sum of \$26,000.00." Was it \$26,000.00 or \$23,000.00?

A. It was \$23,000.00.

Q. At the time of this letter of March 23, although it was drawn on April 6, and dated back, was the balance \$23,000.00 or \$26,000.00?

A. \$23,698.00.

Q. It remained at that figure until May 6?

A. Yes, sir.

Q. That was a second mortgage?

A. That mortgage was given to us after we had taken another mortgage.

Q. Who had the first mortgage?

(Testimony of W. L. Casey.)

A. That is what I am trying to explain. We had a mortgage; after we got a mortgage on the equipment then the boys borrowed.

Q. Who are the boys?

A. Anderson Brothers. They got a R F C loan.

Q. On the equipment?

A. Yes, and we took a second mortgage.

Q. Did you waive your rights in order for the R F C to get a first mortgage?

A. I don't recall that we did.

Q. Then, why do you say a second mortgage?

A. Evidently it was a second mortgage, the other had a first mortgage.

Q. The other was the R. F. C.?

A. Yes, sir.

Q. Do you know how much their mortgage was?

A. Twenty-six thousand.

Q. In the same amount as this?

A. Twenty-three thousand at that time.

Q. You said in the letter——

A. ——The R. C. or R. F. C. was thirty thousand and was paid down I don't know exactly how much but from a letter, when they made settlement they owed the R. C. about twenty-six thousand or maybe twenty-four thousand.

Q. In this letter (indicating) you mention fifty-two thousand, how was that made up?

A. That was from the mortgage on the equipment; this fifteen thousand dollar note and the amount of the advertising material, and this contract.

(Testimony of W. L. Casey.)

Q. And the good will?

A. If it was worth anything, the good will.

Q. Did you capitalize it, put a value on it?

A. I would say in a business deal when you turn over the business you turn over the good will.

Q. Were you paid for good will?

A. I don't know whether that would be good will or not. I got \$52,362.00.

Q. That is all the money you got? [146]

A. That was all——

Q. ——just a moment, Mr. Casey,—that is all the money you got for the Wyoming Mineral Products Company or in the name of Casey?

A. \$40,000.00, the \$23,000.00 and the notes; \$40,416 cash was every dime I got out of it.

Q. There was listed here (indicating exhibit) check for \$16,818. A. Yes.

Q. Did you get more as a Director or as an individual? A. As an individual.

Q. Didn't you have a check signed by the Sulphur Springs Gypsum Company and deliver it, for \$26,000.00 to the new purchasers?

A. I don't recall whether Mr. Cullen took that or I did.

Q. The books were kept for the Wyoming Mineral Products Company and the Sulphur Springs Gypsum Company in your office?

A. That's right.

Q. Checks were issued from your office?

A. That's right.

(Testimony of W. L. Casey.)

Q. You don't recall whether you took it or Cullen did?      A. I didn't take it over.

Q. Were the assets surrendered to the new purchasers of the Sulphur Springs Gypsum Company on the 6th of May?      A. That's right.

Q. All the cash on hand of the Sulphur Springs Gypsum Company was turned over to the new purchasers?      A. Yes, sir. [147]

Q. Had Cullen and Etter submitted a bill to the Sulphur Springs Gypsum Company other than that five hundred dollar bill that was paid and submitted on the 16th of March,—submitted on the 6th and paid on the 16th?      A. Not that I know of.

Q. You turned over twenty-three thousand shares of stock pledged as security for the balance of \$14,000?      A. That's right.

Q. You had a twenty-three thousand dollar balance on this mortgage?      A. Yes, sir.

Q. That property was sold for \$71,000.00?

A. Yes, sir.

Q. If they hadn't paid the \$23,000.00,—you didn't surrender that property, did you?

A. No, that was sold. Anderson Brothers sold their equipment and storehouse,—warehouse for \$71,000.00, out of the \$71,000.00 I got this \$23,000.00.

Q. All you had there was \$23,000.00, or \$23,700.00.      A. That's right.

Q. Mr. Casey, you were aware of the fact that from March to the 6th of May Cullen and Etter were serving as Attorneys in this proceeding?



(Testimony of W. L. Casey.)

A. That's right.

Q. But you deny that they were representing you?

A. My individual stuff was on my own. [148]

Q. Do you know they were representing the other people in their individual capacity, Mr. Davis, Busch, and Keinholz. Do you know that?

A. I know they had their meetings up there and this contract was drawn and that it was understood that all the attorney's fees to be paid was in that contract.

Q. Mr. Casey, did you bring Anderson Brothers and Mr. Jensen and Mr. Busch into the office of Cullen and Etter and discuss this matter with Cullen and Etter prior to the time you got any money?

A. That's right, they were up there. I told them Mr. Adams was going to raise the money and wanted us to buy them out; that he had a contract. At that time as I recall we came up for the reason that they wanted to see if the deal would go through.

Q. Did you ever tell Cullen and Etter you were not going to pay for their services in this matter?

A. They never asked for attorney's fees.

Q. You deny that you told Mr. Cullen they had done a good job for those fellows and you were going back and tell the others what a good job they had done and that you were indebted to them several thousand dollars.

A. I knew they had done a good job. I certainly didn't tell them that I owed them several thousand

(Testimony of W. L. Casey.)

dollars and was going to come back and pay them.

Mr. Hawkins: That is all. [149]

### Redirect Examination

By Mr. Young:

Q. Was the mortgage with Anderson Brothers drawing interest?      A. Yes, sir.

Q. What was the rate?      A. Six per cent.

Mr. Young: That is all.

Mr. Hawkins: Nothing further.

The Court: We will recess until 1:15. Counsel will meet me at 1:15.

November 24, 1948, 1:15 P.M.

The Court: Did the defendants rest.

Mr. Young: The defense rests.

Mr. Hawkins: Plaintiffs rest.

Mr. Young: The parties having rested their case and the testimony having been put in, comes now the defendant Casey and wife and moves the Court for a directed verdict in this case or in the alternative for a judgment of nonsuit or dismissal, for the reasons heretofore stated in the motion made at the conclusion of the plaintiffs' case. It appears that there is no testimony supporting any of the allegations of the complaint and there has been a total failure of proof of a contract of employment between the defendants Casey and wife and the plaintiffs; that under the law of Washington the place where the contract was made, the [150] defendants

had the right to terminate the relation at any time they chose without cause, and that the attorneys would only be able to recover for the reasonable value of the services up to the time of that termination. It appears that Casey, on behalf of the community, negotiated for and completed each and every and all business transactions in connection with the subject matter of this litigation; moreover it does not appear that there was any telephone calls and office expense in the sum of \$39.14 expended for and on behalf of the defendants Caseys, and there is a total absence of proof upon which recovery can be had in this case.

The Court: The item of \$39.14 may be eliminated and the jury will be instructed to disregard it, otherwise the motion is overruled.

The record may show that counsel met at this time with the Court in chambers to go over the instructions and were advised of the instructions the Court would give.

(Argument to the jury)

The Court: Lady and Gentlemen of the Jury: It is the duty of the Court at this stage of the trial to instruct you as to the principles of law applicable to the matter you are to determine. You have been very attentive during the entire trial and I am sure it is unnecessary to go into great detail as to the pleadings [151] on file or the issues as made up by those pleadings. As you have been advised this is an action brought by the plaintiffs R. Max Etter and

William E. Cullen, against the defendant W. L. Casey wherein they seek to recover \$15,039.14 by reason of the allegations in their complaint, they allege that they have rendered certain services for the defendants and that the defendants had agreed to pay them for the services rendered and that the amount of \$15,000.00 is a reasonable fee for such services and that they have advanced \$39.14 and they seek to recover this amount in the action now on trial here. The \$39.14 item has been stricken by the Court and you will not consider that item.

The defendants have filed an answer denying the allegations of the complaint.

I think I will permit you to take the pleadings, that is, the complaint of the plaintiffs and the answer of the defendants, to the jury room with you and you may refer to them for any assistance they may be to you in your deliberations.

In passing upon the issues in this case the burden is upon the party asserting the existence of a fact to establish that fact, thus you will see that in a case such as we are considering here the burden is [152] upon the plaintiffs to establish by a preponderance of the evidence, the cause of action as set forth in their complaint.

By a preponderance of the evidence is not meant a greater number of witnesses, but a greater weight of the evidence. That is what the word "preponderance" means; evidence which convinces you that the truth lies upon one side or the other. It is evidence which is more convincing.



You are the sole Judges of the credibility to be given to the testimony of any witness, and in determining the weight which you give to testimony you may consider the interest of the witnesses, if any, in the result of the case, the demeanor, and frankness of the witnesses while on the stand. In other words, bring to bear your common sense and experience in hearing the testimony and in passing upon the credibility of the witnesses.

You will, of course, accept the instructions of the Court as the law of the case. It is my duty to give you the law, and likewise it is your duty to accept the law as given, you will recall that is one of the questions asked you before you were sworn to act in this [153] case. It is possible, while not probable that some juror may have a preconceived notion as to what the law is or should be, and that may differ from the law as given by the Court, for that reason, the wise provision was made that it should be the duty of the Court to give the law and the duty of the jury to accept it.

I will also mention that it is your duty and your right to pass upon the facts, this, the Court has nothing to do with, and I cannot help you in any way because we have an equally wise provision that it shall be the jury's responsibility to pass upon the facts.

This case has been ably tried and the question you are to pass upon is relatively simple; the evidence in some regards has taken a rather wide range, but after all has been said the question for you to decide



is: Was there a contract between the plaintiffs and this defendant, and I do not mean by that a written contract, I mean was there an understanding,—a meeting of the minds between the plaintiffs and the defendant concerning the employment of the plaintiffs to do certain work and render certain services for the defendant. If you determine that there was such agreement, then you will come to the question; did the plaintiffs render the service; if you determine that they did; then you come to the [154] question of the amount they are entitled to receive as compensation for those services. On the other hand, if you answer the first question in the negative, that is, if you determine there was no understanding or agreement between the plaintiffs and the defendant concerning work to be done and services to be rendered, you need go no further, as your verdict will be for the defendant, and likewise if you determine that the plaintiffs did not render any service to the defendant, your verdict will be for the defendant.

In your deliberation if you determine that there is an amount due from the defendant to the plaintiffs, you will bear in mind that it is a question left to twelve men and women such as you to determine what is fair and just and what is a reasonable amount to be allowed, keeping in mind the evidence in this case as to the work done and amounts involved and such other evidence as will determine the amount that you think is fair and reasonable.

If you find from a preponderance of the evidence

in this case that the defendants did in fact employ the plaintiffs to render services for and on their behalf, such contract is terminable at the will of the defendants, and the [155] defendants would not be precluded thereby from settling or compromising any matters which may have been the subject of such employment, if any you do find to have arisen between plaintiffs and defendants.

In this connection I instruct you that if you find from a preponderance of the evidence that the defendants did in fact employ the plaintiffs and that following such employment the defendant did in fact settle the controversy which was the subject of the employment without consulting the plaintiffs, such settlement would have the effect of terminating the employment of the plaintiffs, and the plaintiffs would only be entitled to recover for the reasonable value of their services rendered up to the time of such settlement by the defendants.

I instruct you that the mere fact that the plaintiffs, in their capacity as attorneys, rendered services at the instance of the Sulphur Springs Gypsum Company, a corporation, and that those services may have been beneficial to the defendant, would not render the defendants liable to pay the plaintiffs any compensation in the absence of an agreement running from them to the plaintiffs to pay for such services. In other words, an obligation to pay for attorneys' services must rest [156] a legal duty to pay rather than moral considerations.

I think I should say to you in that regard that the

fact, if you find it to be a fact that the plaintiffs Etter and Cullen had a contract with or performed services for other individuals or corporations and received fees or compensation for such services is not a matter that concerns you in your deliberations here. You are concerned only with the question of whether there was an agreement for services between the plaintiff and defendant and whether the services were rendered and paid for, if you find services were rendered by the plaintiffs for the defendant under agreement, and not paid for by the defendant, then you will find the amount due and so state by your verdict.

Expert testimony has been submitted to you in this case, as is done in many cases, and by expert testimony of course, is meant, usually an opinion of an expert or a person skilled, trained and qualified in some line of work or profession, the opinion is given to acquaint the jury with matters under consideration from the standpoint of such trained expert. Such testimony is no doubt of great assistance, but in the final analysis you will pass on the facts, determining which party should prevail, and if you determine the plaintiffs should prevail, [157] you will fix the amount to be allowed.

You will not consider any remarks made by the Court in ruling on questions during the course of the trial. If you have gathered from any remark made by the Court in ruling on evidence or otherwise, during the trial of the case, that the Court has any opinion as to the facts, then you will dismiss

that from your minds. It has not been my intention to indicate any feeling in the matter, as I have told you heretofore, it is your responsibility, and yours alone, to pass upon all questions of fact.

It is necessary that you all agree in finding a verdict, when you retire you will elect one of your members as foreman, when you arrive at a verdict your foreman alone will sign the same and return it to open Court.

Two forms of verdict have been prepared and you will use the one which reflects your finding. One is prepared with a blank space for the amount of compensation, in case your verdict is in favor of the plaintiffs, the other has no blank space and is to be used if your verdict is in favor of the defendant.

I will ask you to retire for just a moment [158] while I take up a matter of law with the attorneys, you will then be called back for final instruction.

The Court: Do you have any objection, Gentlemen, to the instructions of the Court as given.

Mr. Young: No objection.

Mr. Hawkins: None at all.

Mr. Young: I have one thought, Your Honor, perhaps in the nature of a stock instruction in view of some remarks or inference that my client is a wealthy retired man, I think the instruction should be given that all persons are equal before the law; that they should not consider the needs of one and the ability of the other to pay but that all persons are equal before the law. I think in view of counsel's remarks in the argument that instruction should be given.



The Court: Mr. Bailiff, you may return the jury.

Now, Lady and Gentlemen of the Jury, during the course of my instructions I failed to advise you that you are only to consider testimony that have been given to you from the stand. Attorneys, in their arguments because of no fault or desire to mislead the jury but by explanation from their viewpoint sometimes get a little beyond the evidence and you should not consider any statement by counsel on either side as to the [159] evidence, if it is not as the evidence was given from the witness stand. You will only consider the evidence of the witnesses as given on the stand, and of course, giving attention to the attorneys' arguments as it applies to the evidence. It has also been called to my attention that there have been some remarks made on both sides which may have some influence here, however, I know that you will not consider them in your deliberation and in your consideration of the case. I will caution you, however, that you should not consider this case as between the plaintiffs as attorneys and the defendants as wealthy retired persons. You will consider this case as being between two parties entirely equal. If we were trying a case here where one party was a corporation and the other an individual, you would not consider that at all, you would treat them as equals; that is the way cases must be tried and decided, you will take the evidence and on that determine which side should prevail.

Are counsel satisfied?

Mr. Young: Very much.

Mr. Hawkins: Yes, Your Honor.



The Court: The Bailiffs will be sworn and the jury may retire to consider their verdict. [160]

CERTIFICATE

State of Idaho,  
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official reporter for the United States District Court, District of Idaho; I further certify that I reported the evidence given and the proceedings had in and about the trial of the above entitled cause and thereafter transcribed the same.

I further certify that the foregoing transcript consisting of pages numbered to 160 exclusive of this certificate, is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In witness whereof I have hereunto set my hand this 28th day of June, 1949.

/s/ G. C. VAUGHAN,  
Reporter.

[Endorsed]: Filed July 1, 1949.

[Endorsed]: No. 12287. United States Court of Appeals for the Ninth Circuit. W. L. Casey and Agnes Casey, Appellants, vs. R. Max Etter and William E. Cullen, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed July 7, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 12287

R. MAX ETTER and WILLIAM R. CULLEN,  
Appellees,

vs.

W. L. CASEY and MRS. JANE DOE CASEY  
(whose true Christian name is AGNES CASEY), his wife,

Appellants.

OF RECORD FOR PRINTING  
ADOPTION OF POINTS AND DESIGNATION

Come now the appellants and in compliance with Rule 19, sub-division 6, hereby adopt as their points the statement of points filed in the District Court herein and which appear in the record forwarded

by the Clerk of the District Court to the Clerk of this Court, and appellants hereby designate such as the record to be used on appeal herein and in the printing thereof does respectfully request the Clerk of this Court in the preparing of such record to omit the title on all pleadings filed in the cause except on the complaint, and insert in lieu thereof "title of court and cause" followed by the name of the pleading or instrument, and the date of filing. You will also please omit the verifications and note in lieu thereof "duly verified" if the same be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for the Appellants.

[Endorsed]: Filed July 7, 1949.

